1105

No. 3000

United States

Circuit Court of Appeals

For the Ninth Circuit.

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In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

CHARLES E. KING,

Appellant,

vs.

WILLIAM O. SMITH, E. FAXON BISHOP, ALBERT F. JUDD and ALFRED W. CARTER, as Trustees Under the Will and of the Estate of BERNICE PAUAHI BISHOP, Deceased,

Appellees.

Transcript of Record.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filed
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F. D. Monckton,
Clerk.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Petition for Allowance of Resignation of Samuel M. Damon as Trustee.

To the Honorable Presiding Judge at Chambers of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

Your petitioners, W. O. Smith, Samuel M. Damon, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, all residing in the City and County of Honolulu, Territory of Hawaii, respectfully represent and show:

1. That your petitioners are the Trustees under the Will and of the Estate of Bernice Pauahi Bishop, late of Honolulu aforesaid, deceased, who died on the 16th day of October, 1884, and whose Will and the two codicils thereto were admitted to probate by the Supreme Court of the Hawaiian Islands on the 2d day of December, 1884, as the last Will and Testament of said deceased;

2. That said Samuel M. Damon, one of your petitioners, has presented to the remaining of your petitioners his written resignation from the office of trustee under the said will and of the said estate, a copy whereof, marked Exhibit "A," is attached hereto and made a part hereof;

3. That said Samuel M. Damon is, and for some time last past has been, absent from the Territory of

Hawaii, sojourning in the State of California, and is therefore unable to perform his duties as such Trustee; [1*]

4. That said Samuel M. Damon therefore desires to resign his said office as such Trustee and be relieved and discharged from his responsibility as such Trustee, and by reason of the facts aforesaid the remaining of your petitioners are willing that the resignation aforesaid of said Samuel M. Damon be allowed and that some other suitable person be appointed as a trustee under the said Will and of the said Estate in succession to said Samuel M. Damon;

WHEREFORE your petitioners pray that the resignation of the said Samuel M. Damon be allowed to take effect upon the appointment of his successor as Trustee under the said Will and of the said Estate; and your petitioner, said Samuel M. Damon, prays that he may be discharged of all further responsibility as such Trustee, and that his bond may be ordered to be cancelled, and his sureties thereto released from their obligation thereunder.

Dated June 9th, 1916.

WILLIAM O. SMITH,
SAMUEL M. DAMON,
E. FAXON BISHOP,
ALBERT F. JUDD and
ALFRED W. CARTER,
Said Petitioners.

By (Sgd.) HOLMES &. OLSON,
Their Attorneys. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

EXHIBIT "A."

Belmont, Cal., May 19th, 1916.

Trustees Under the Will and of the Estate of Bernice P. Bishop, Deceased, Honolulu.

Dear Sirs:

I hereby resign the office of trustee under the Will and of the Estate of Bernice P. Bishop, deceased, this resignation to take effect upon the appointment of my successor in office.

Yours truly,

S. M. DAMON. [3]

Territory of Hawaii,
City and County of Honolulu,—ss.

Albert F. Judd, being first duly sworn, deposes and says:

That he is one of the petitioners in the foregoing petition; that he has read the said petition and knows the contents thereof and that the same are true to the best of his knowledge, information and belief.

(Sgd.) ALBERT F. JUDD.

Subscribed and sworn to before me this 9th day of June, 1916.

[Seal] (Sgd.) FLORENCE LEE,
Notary Public, First Judicial Circuit, Territory of Hawaii. [4]

[Endorsement]: In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Petition for Allowance of Resignation of Samuel M. Damon as Trustee. Filed 3:25 o'clock P. M. June 9, 1916.

(Sgd.) Huron K. Ashford, Clerk. Eq. No. 2048. Reg. 2, pg. 297. Holmes & Olson, Attys. for Petitioners. [5]

Plaintiff's Exhibit "A"—Resignation of S. M. Damon as Trustee, Dated Belmont, May 19, 1916.

Belmont, Cal., May 19th, 1916.

Trustees Under the Will and of the Estate of Bernice P. Bishop, Deceased, Honolulu.

Dear Sirs:

I hereby resign the office of trustee under the Will and of the Estate of Bernice P. Bishop, deceased, this resignation to take effect upon the appointment of my successor in office.

Yours truly,

(Signed) S. M. DAMON.

[Endorsement]: In the Matter of the Estate of Bernice P. Bishop, Deceased. Resignation of S. M. Damon as Trustee. Eq. No. 2048. Reg. 2., pg. 297. Eq. No. 2048. Plaintiff's Exhibit "A." Filed June 9, 1916. (Signed) Huron K. Ashford, Clerk. [6]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Petition for Confirmation of Appointment of a New Trustee.

To the Honorable Presiding Judge at Chambers of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii:

Your petitioners, William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, all residing in the City and County of Honolulu, Territory of Hawaii, respectfully represent and show:

1. That your petitioners are Trustees under the Will and of the Estate of Bernice Pauahi Bishop, late of Honolulu aforesaid, deceased, who died on the 16th day of October, 1884, and whose Will and the two codicils thereto were admitted to probate by the Supreme Court of the Hawaiian Islands on the 2d day of December, 1884, as the last Will and Testament of said deceased;

2. That Samuel M. Damon of said Honolulu, one of the five trustees under the said Will and of the said Estate, has resigned his office as such Trustee, and by reason thereof a vacancy has occurred.

3. That in and by the said Will it is provided that any such vacancy shall be filled by the choice of a majority of the Justices of the Supreme Court of Hawaii, the selection to be made from persons of the Protestant religion;

4. That on the 9th day of June, 1916, a majority of the [7] Justices of the Supreme Court of the Territory of Hawaii, under and by virtue of the power of appointment conferred upon them by the

said Will as aforesaid, appointed William Williamson of said Honolulu, Trustee under the said Will and of the said Estate in the place of and in succession to the said Samuel M. Damon, resigned as aforesaid;

5. That the said William Williamson is a resident of said Honolulu and is a person of the Protestant religion and is a proper and suitable person to be appointed as such Trustee and to act as such, and is willing to accept such appointment and become such Trustee, and is ready and willing to undertake and perform the duties appertaining to such office;

WHEREFORE, your petitioners pray that the appointment of said William Williamson as a Trustee under the said Will and of the said Estate in the place of and in succession to said Samuel M. Damon, resigned, be approved and confirmed upon his filing a bond in accordance with such order as this Honorable Court shall make.

Dated, June 9th, 1916.

WILLIAM O. SMITH,
E. FAXON BISHOP,
ALBERT F. JUDD and
ALFRED W. CARTER,

Trustees Under the Will and of the Estate of Bernice Pauahi Bishop, Deceased,

By (Signed) HOLMES & OLSON,
Their Atorneys. [8]

Territory of Hawaii,
City and County of Honolulu,—ss.

Albert F. Judd, being first duly sworn, deposes and says:

That he is one of the petitioners in the foregoing petition; that he has read the said petition and knows the contents thereof and that the same are true.

(Signed) ALBERT F. JUDD.

Subscribed and sworn to before me this 9th day of June, 1916.

[Seal] (Sgd.) J. A. DOMINIS,

(S.) J. A. D. Clerk Circuit Court ~~Notary Public,~~ First Judicial Circuit, Territory of Hawaii.

[Endorsement]: Circuit Court, First Circuit, Territory of Hawaii. At Chambers—In Equity. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Petition for Confirmation of Appointment of a New Trustee. William Williamson. Filed 3:45 o'clock P. M., June 9, 1916. (S.) Huron K. Ashford, Clerk. Eq. No. 2048. Reg. 2, pg. 297. Holmes & Olson, Attorneys for Ptff. [9]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Decree Accepting Resignation of S. M. Damon as Trustee.

The petition of W. O. Smith, Samuel M. Damon, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, filed herein on the 9th day of June, 1916,

whereby the said petitioners pray the allowance of the resignation of said Samuel M. Damon from the office of Trustee under the Will and of the Estate of Bernice Pauahi Bishop, deceased, and the said Samuel M. Damon, one of said petitioners, prays for his discharge from all further responsibility as such Trustee and for the cancellation of his bond and the release of his sureties on said bond from their obligation thereunder, having come on to be heard before the undersigned presiding judge at Chambers of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, and evidence having been adduced at said hearing held this 9th day of June, 1916, in support of the allegations of the said petition, and it appearing that the said allegations are true, and good cause apeparing why the prayer of the said petitioners for the allowance of the said resignation should be granted, and no good cause why the same should not be granted;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the resignation of the said Samuel M. Damon from the office of Trustee under the Will and of the Estate of the above-named Bernice Pauahi Bishop, deceased, be, and the same is hereby, approved, accepted and allowed, and that said resignation take [10] effect upon the appointment of the successor to said Samuel M. Damon in said office;

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the said petitioners forthwith upon the appointment of a successor to said Samuel M. Damon in said office file herein a

true and correct account of the said Estate as such Trustees and that upon the approval thereof and the vesting of the said estate in the said petitioners other than said Samuel M. Damon, together with the successor to said Samuel M. Damon, as Trustees under the said Will and of the said Estate, the said Samuel M. Damon be discharged from all further liability or responsibility as such Trustee, and his bond cancelled and his sureties thereon discharged and released from all liability thereunder.

Dated, June 9th, 1916.

(Circuit Court Seal)

(Signed) C. W. ASHFORD,
First Judge, Circuit Court, First Circuit, Territory of Hawaii, Presiding at Chambers.

Attest: (Signed) HURON K. ASHFORD,
Clerk of Said Court.

[Endorsement]: In the Circuit Court of the First Judicial Circuit Territory of Hawaii. At Chambers—In Equity. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Decree Accepting the Resignation of Samuel M. Damon, as a Trustee. Filed at 8:40 o'clock A. M., June 10th, 1916. (S.) J. A. Dominis, Clerk. Eq. No. 2048. Reg. 2, pg. 297. [11]

In the Circuit Court of the First Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

EQUITY No. 2048.

In the Matter of the Resignation of SAMUEL M. DAMON as a Trustee Under the Will and of the Estate of BERNICE PAUAHI BISHOP, and the Appointment of a Successor to Said Trustee.

Opinion and Decision.

BEFORE THE FIRST JUDGE.

THE HIGH CHIEFESS, BERNICE PAUAHI BISHOP—"the last of the KAMEHAMEHAS"—died testate, in Honolulu, October 16, 1884, and her Last Will and Testament, including two Codicils, was admitted to Probate December 2nd, 1884, in the Supreme Court of the Hawaiian Islands, which Court, at that date, had jurisdiction of Probate and Equity matters. In and by the Fourteenth paragraph of her said will Mrs. Bishop appointed her husband, CHARLES R. BISHOP, SAMUEL M. DAMON, CHARLES M. HYDE, CHARLES M. COOKE, and WILLIAM O. SMITH, all of Honolulu, "to be her trustees to carry into effect the trusts" specified in the will. Said paragraph contains the further provision which I here quote:

> "I further direct that the number of my trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Jus-

tices of the Supreme Court, the selection to be made from persons of the Protestant religion."

THE PRIMARY OBJECT expressed in the will, mentioned [12] is contained in the Thirteen paragraph thereof, from which I quote as follows:

> "I give, devise and bequeath all of the rest, residue, and remainder of my Estates real and personal, wheresoever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools."

AND, AFTER MAKING COMPREHENSIVE PROVISION of funds for the maintenance and conduct of said Schools, and for devoting "a portion of each year's income to the support and education of orphans and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood," said paragraph instructs the trustees "to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women," making "the higher branches subsidiary to the foregoing objects." Full power of control over the donor's Estate to sell, invest and reinvest, etc., is given, together with authority "to make all such rules and regulations as they (the trustees) may deem necessary for the government of said Schools and to regulate the admission of pupils, and the same

to alter, amend and publish upon a vote of a majority of said trustees."

THE TRUSTEES, acting under the will, have established two schools at Kalihi, in this city, one for boys and one for girls. The boys' school has been in operation about twenty-nine years, and has graduated twenty-six annual classes of students. The girls' school was established some years later than that for boys. As a matter of practical administration of the trusts, the trustees have limited to boys and girls of aboriginal Hawaiian blood (either in whole or in part), the privilege of attending said Schools, although there is no such limitation provided for in the will. The only expression of preference for Hawaiians, as objects of the bounty of the donor, is that above quoted, namely, the provision that, in the distribution of a portion of each year's income to the support and education of orphans and others in indigent circumstances, preference shall be given to Hawaiians, of pure or part aboriginal blood. [13]

THE ESTATE NOW CONTROLLED by the trustees under the will approximates Five Million Dollars in value; the Schools are large and apparently well equipped, and the board of trustees, throughout its changing *personnel,* has adopted and maintained a scheme of education upon lines so broad and comprehensive (notwithstanding the above mentioned limitation of the privilege of attendance to Hawaiians), as to invest this trust with all the characteristics of a quasi public trust, and as

such, I shall regard it in the course of this opinion. And this quasi public character of the trust invests it with an interest which impels the Court to a somewhat closer scrutiny of the affairs which it comprehends than might be called for in the case of a purely private trust.

AS ABOVE, five individuals were named to constitute the original board of trustees, but during the nearly third of a century that has since elapsed, many changes in the *personnel* of the board have taken place. The latest of these changes consisted in the resignation of SAMUEL M. DAMON as such trustee, which resignation was, by his co-trustees, presented to this Court for acceptance, on the 9th of June last, and a decree approving and accepting said resignation, and providing for the presentation of the accounts of the trustees as the same shall stand immediately upon the qualifying of a successor to said SAMUEL M. DAMON, was immediately signed and fixed in this cause. Immediately thereafter, the four remaining trustees, namely: WILLIAM O. SMITH, E. FAXON BISHOP, ALBERT F. JUDD and ALFRED W. CARTER, presented to the Court their *"Petition for confirmation of appointment of a new Trustee."* This petition sets forth that a vacancy in said board of trustees exists by reason of the resignation of said SAMUEL M. DAMON; that said will provides that such vacancy shall be filled by the choice of a majority of the Justices of the Supreme Court of Hawaii, the selection to be made from persons of the Protestant religion; that on said 9th day of June, a majority (to wit: all)

of the Justices of said Supreme Court, "under and by virtue of the power of appointment conferred upon them by said will as aforesaid, appointed WILLIAM WILLIAMSON, of said Honolulu, trustee under said will, and of the Estate, in place of and in succession to the said SAMUEL M. DAMON, resigned as aforesaid; that said WILLIAM WILLIAMSON is a resident of Honolulu, and is a person of the Protestant religion, and is a fit and proper and suitable person to be appointed as such trustee and to act as such, and is willing to accept said appointment and to become such trustee," etc. And it prays "that the appointment of said WILLIAM [14] WILLIAMSON as a trustee under the said will and of the Estate in the place of and in succession to said SAMUEL M. DAMON, resigned, be approved and confirmed upon his filing a bond in accordance with such order as this Honorable Court shall make."

IN SUPPORT OF THE ALLEGATIONS of said last named petition, said remaining trustees introduced in evidence certified copies of three documents, as follows:

(1) A request, under date of said June 9th, by said remaining four trustees, addressed to the Justices of said Supreme Court, by name, wherein it is represented that the signatory parties to said request are trustees under said will; that said SAMUEL M. DAMON, formerly such trustee, has resigned, and that by reason thereof there is now a vacancy in said office; that in and by the said will it is provided that the number of trustees thereunder and of said Estate

shall be kept at five, and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion. And the signatory parties request said Justices to appoint some person as such trustee, in place of and in succession to, said SAMUEL M. DAMON, "and suggest that WILLIAM WILLIAMSON, of said Honolulu, who is a person of the Protestant religion, is a suitable and proper person to be appointed such trustee, and respectfully recommend his appointment as such";

(2) An affidavit by said WILLIAM WILLIAMSON to the effect "that he is a person of the Protestant religion";

(3) A paper entitled "Appointment of Trustee," signed by the Chief Justice and the Associate Justices of said Supreme Court, reciting the resignation of said DAMON and the vacancy existing in said board of trustees by reason thereof, the provision of said will as to the manner in which such vacancies shall be filled (as hereinabove repeatedly quoted), and a purported appointment of said WILLIAM WILLIAMSON as such trustee, in the following language:

> "Now, Therefore, Know All Men By These Presents: That the undersigned Justices of the Supreme Court of the Territory of Hawaii, being a majority of the Justices of said Supreme Court, by virtue and in exercise of the power for this purpose given to them in and by said will, do hereby appoint WILLIAM WILLIAMSON of the [15] City and County of Hono-

lulu, Territory of Hawaii (a person of the Protestant religion), a trustee under the said will and of the said Estate in place of, and in succession to the said SAMUEL M. DAMON, resigned."

ORAL EVIDENCE was also introduced touching the personal, moral and business qualifications of said WILLIAM WILLIAMSON for appointment to a place upon said board. As to this feature, the Court desires to express entire satisfaction with the qualifications of MR. WILLIAMSON for such appointment, in all respects save one, namely; that it has not been made to appear that he is so qualified, by length of residence in Hawaii, or by familiarity and sympathy with the history, manners, customs, language, ideals and aspirations of the Hawaiian people as to mark him out as a fit and suitable person to be appointed to an office where he would be authorized and expected to exercise a wide, benevolent and sympathetic discretion with reference to the education of Hawaiian youth, of either sex, and concerning the general scheme, system and regulations to be adopted and observed during their attendance at the Schools in question. The Court reserved its ruling upon the petition, because of doubts which it entertained concerning the authority of the Justices of the Supreme Court to make such an appointment, and the validity of the appointment as so purporting to have been made, and arranged for argument upon those points. The Court further requested Mr. D. L. WITHINGTON, and Ex-Judges PERRY and HUMPHREYS,

members of this bar, to favor it with their views, as *Amici Curiae,* upon the questions involved. The Alumni Association of Kamehameha Schools retained E. C. PETERS, Esq., to present the views of that Association, and upon the day appointed for further hearing, elaborate arguments were submitted on the part of the trustees, by the *Amici Curiae,* and by Mr. Peters; and the Court desires here to express its sense of obligation to the gentlemen who so willingly and at the sacrifice of much time and effort made research into the questions involved, and favored the Court with the results of such research, as *Amici Curiae.* The fact that the Court has reached conclusions quite different from those reached by the gentlemen last referred to, should in nowise detract from the credit due to them for their exhaustive labors and illuminating arguments in the premises.

IT IS TO BE OBSERVED that the petition now under consideration is one praying for the "confirmation" by this Court of the "appointment" of Mr. WILLIAMSON, as such trustee [16] alleged to have been made by the Justices of the Supreme Court. And this brings us to a consideration of the question whether the Justices of the Supreme Court had any right, authority, or jurisdiction to so appoint a trustee, or, in the language of the will, to make and certify a "choice" of a person to be so appointed, to fill the existing vacancy. In this connection, a review of the history of the appointments heretofore made to fill such vacancies is both interesting and instructive. And this review,

of necessity, includes a consideration of the state of our statute law at the date of the execution by Mrs. Bishop of her Will and the Codicils thereto; at the date of the admission of the Will to Probate; at the date of the filling of the first vacancy, and at the present date. Advertising first to this feature of the case, we find that at all times including the dates of the execution of the Will and Codicils, and thence to the taking effect of the Judiciary Act of 1892, which went into operation January 1st, 1893, the Supreme Court, and the several justices thereof, had jurisdiction of all matters in equity. *Session Laws* 1878, Chap. XV, Sec. 2, *Compiled Laws,* 1884, p. 389. At the argument herein, it was suggested, on behalf of the trustees, that not the Supreme *Court,* but only the individual Justices thereof had equity jurisdiction, prior to the taking effect of the Judiciary Act above mentioned. But this feature has been expressly decided to the contrary in *Asing* v. *Aiona,* 6 Hawn. 281. Upon the state of law thus suggested, is based the claim of the trustees that the donation to the Justices of the Supreme Court of the power of appointment, was not a donation to the Court as such, acting judicially, but, on the contrary, that it was a donation to the individuals who, at the date of any specific request for such appointment, should chance to hold those offices. I deter to a later portion of this opinion, a more minute examination of this phase of the question.

WITH RESPECT TO THE POWER OF APPOINTMENT, in such a case, we may start

with the familiar proposition that it is competent for the donor of a power, whether created by will or by deed, to name a trustee or trustees to execute the trust, or, to leave their selection to others, whether private individuals, public officials, or courts of competent jurisdiction—and, in like manner, to provide for the filling of any vacancies that may arise in the trusteeship. This principle is thus succinctly expressed in 28 *Am. & Eng. Ency. of Law,* 2 Ed. p. 964:

> "It is the right of the creator of a trust to provide a method for filling vacancies occurring in the [17] office of trustee, subject to the statutory requirements to be found in most jurisdictions, that the trustee so appointed must be accepted by the court."

THERE IS NO SUCH statutory requirement in this territory, that a trustee so appointed be accepted by the court; but it is familiar law, so familiar that the citation of decisions in support thereof may be dispensed with, that where no provision has been made for the filling of such vacancies or where the provision attempted to be made is an illegal and void one, or where such provision, although valid when made, has become incapable of execution by reason of changes in the statute law—then, such appointment shall pertain and belong to the court exercising equity jurisdiction. Consequently, in the case at bar, if it be found either that the method provided in the Will for the appointment of trustees to fill vacancies was illegal, or incapable of execution according to law as the law stood when the

first such attempt was made, or, of legal and valid, at an earlier period, that it has become illegal, invalid and incapable of execution at a later date, then the authority to fill the now subsisting vacancy devolves upon the judge or judges of the First Circuit Court, exercising equitable jurisdiction, at chambers. First let us consider whether the power was valid, and could have been exercised according to the law prevailing in Hawaii at the date of the Will, and at the date of its probate, and, possibly, at any subsequent date upon which such appointment was sought. For the purposes of this feature of the discussion, I will assume a point which, later in this opinion, I will endeavor to fortify by the citation of authorities, namely, that the power to fill vacanies in the board of trustees under Mrs. Bishop's will was conferred, not upon the individuals who might chance, for the time being, to hold the offices of Justices of the Supreme Court, but that it was, by virtue of the language employed in the will, conferred upon said Supreme Court as a judicial tribunal. Upon this assumption the power was valid, and might have been executed by the Supreme Court in strict conformity with the statute law of Hawaii as it then existed, namely, by virtue of Chapter XV, of the Session Laws of 1878, which remained (at least substantially) without amendment until the Judiciary Act of 1892 went into operation, January 1st, 1893. By that statute (Chapt. XV, 1878) not only the several Justices of the Supreme Court but the Supreme Court itself, were given jurisdiction to hear and determine all

matters in equity (*Asing* v. *Aiona,* 6 Hawn. 281, *supra*). This point is placed almost, if not entirely, beyond question by one feature in the history of this Estate. It is this: W. O. SMITH, one of the trustees named in the will **[18]** having removed to California, tendered his resignation as such trustee to "the Honorable Justices of the Supreme Court of the Hawaiian Islands." The resignation was accepted, thereby creating the first vacancy in the board. Thereupon the Supreme *Court,* as a judicial tribunal, proceeded to appoint a successor to MR. SMITH. I quote liberally from the records of the Court in that matter, as follows:

The proceeding (including the resignation of Mr. Smith) is entitled: "In the Supreme Court of the Hawaiian Islands in re Estate of Bernice Pauahi Bishop, deceased, in Probate, before Judd, C. J., and McCully, J., Thursday, October 21, 1886. Hearing on appointment of a new trustee. (Present, Charles R. Bishop, one of the trustees.)

"Mr. Bishop files the resignation of William O. Smith as a trustee and nominates Joseph O. Carter, of Honolulu, to fill the vacancy. The Court refers to the will of the deceased and in accordance with Article 14 of said will and knowing that said nominee is a person of the Protestant religion, appointed said Joseph O. Carter as a trustee to fill the vacancy. The Court orders the present trustees to execute and file a new bond in the sum of Twenty-five Thousand Dollars ($25,000) on the filing of which the old

bond to be cancelled. New bond filed and old one cancelled.

(Signed) "HENRY SMITH,
Deputy Clerk."

THERE APPEARS some inconsistency between the foregoing, and a certain written Order filed on the same date, and which is entitled:

"In the Supreme Court of the Hawaiian Islands; in the matter of the Estate of Bernice Pauahi Bishop; before the Justices of the Superior Court. Order discharging trustee cancelling trustees' bond and appointing new trustee." The Order recites, inter alia, that William O. Smith was appointed one of the trustees under said will, and whereas he has resigned from said trusteeship, and his resignation has been accepted; "Now therefore we, the Justices of the Supreme Court, in pursuance of the power and authority vested in us by Article 14 of the said will hereby accept the resignation of the said William O. Smith, trustee aforesaid, and discharge him from further responsibility in regard to said trust, ... and appoint as trustee in place of said William O. Smith, Joseph O. Carter of Honolulu, Oahu, ..." The Order is signed by the then Chief Justice, A. F. Judd, and by the then Associate Justices, L. McCully and Edward Preston. [19]

IT IS ALSO WORTHY OF NOTE that the purported appointment by the Justices of WILLIAM WILLIAMSON, besides being signed by the Justices, is impressed with the seal of the Supreme Court, and is filed in the archives of said Court as a

Court document. The same is true of every appointment purporting to have been made by the Justices of the Supreme Court under said will, except that, in one or two instances, the document of appointment is not impressed with the Court's seal.

AS ABOVE, the first vacancy in the board was created by the resignation of Mr. Smith, in 1886, at a date when the Supreme Court and its several justices were exercising both probate and equity jurisdiction. It is a somewhat peculiar fact that in all, or nearly all of the applications for appointments of new trustees under this will, the documents are entitled as "In Probate," instead of "In Equity." Under our system, the court, sitting in probate, has no jurisdiction to appoint trustees, although, doubtless, it may distribute an estate to trustees named in a will. In this respect our system differs from the statutory systems in vogue in several of the New England States, and, perhaps, in other jurisdictions, where statutory authority is conferred upon courts sitting in probate, to appoint trustees, especially in respect of testamentary trusts.

THE GENERAL SYSTEM pursued in the filling of vacancies in the trust now under discussion, since the enactment of the Judiciary Act which became operative January 1, 1893, appears to have been as follows, although with some variations, viz.: the facts constituting the vacancy have been brought to the attention of the Justices of the Supreme Court, with a request that they would make an appointment to fill the vacancy, and such request has invariably been accompanied by a recommendation of

the trustees making it, for the appointment of a specific person; and the Justices have invariably adopted such recommendation and have assumed and purported to appoint the person and persons so recommended. Thereupon (as in the case at bar), the trustees have presented to the Judge of this Court, sitting in Equity, a petition for the "confirmation" of such appointee of the Justices of the Supreme Court, and up to this date, such confirmation has been granted, virtually as a matter of course. This procedure is not a little puzzling to the court, as, if the Supreme Court Justices, as claimed, have the right to "choose" (which they have never, in a literal sense, assumed to do), or to "appoint" a new trustee (as they have invariably assumed to do), then the question arises as to what legal occasion there can possibly exist for a "confirmation" [20] by this Court. Counsel for the trustees, upon argument herein, when questioned as to this feature, was understood to admit that, probably, there is no occasion for such "confirmation"—but he justified the course here taken upon the ground of precedent and, if precedent can justify a specific procedure, the procedure in the present instance is doubtless fully justified. There is, however, authority for the proposition that although some one other than this Court has a right to nominate a trustee, yet the acceptance or confirmation of such nomination rests with this Court. Thus, in *Estate of Schott,* 11 Philadelphia Reports, the Orphans' Court of Philadelphia (a Court of high national reputation), held as follows:

> "Although the legatee has the right to nominate her husband as trustee of her estate, yet it is within the discretion of the court to ratify the choice, and make the appointment. In some cases we have refused, as we believe it contrary to the policy of the law, to appoint a husband trustee of the estate of his wife, or a parent guardian of the estate of his child."

THE EMPLOYMENT of the words "choice" and "appointment" in the foregoing quotation are significant in their relation to the case at bar, for the will of Mrs. Bishop, if it confers any authority upon the Justices of the Supreme Court which has survived to them, confers merely the authority of "choice," or to choose, select and nominate a trustee, to the Court having the jurisdiction to make the "appointment"—which Court, as I conceive, is now, by virtue of our altered judicial system, the Circuit Court or a judge thereof, sitting in equity. It follows, then, from this postulate (even if it be a correct one, which I do not concede), that the maximum authority now resting with the Justices of the Supreme Court is the authority of "choose" and nominate to this Court, in Equity, a candidate to fill such vacancy, leaving it to this Court to accept or reject such nomination, in its discretion, and to appoint or to refuse to appoint such nominee. But, as above, it is my judgment that even this comparatively attenuated authority has been withdrawn from the Justices of the Supreme Court, or, rather, from the Court itself, by virtue of the transfer of equitable jurisdiction from the Supreme Court and its Jus-

tices, to the Judges of the Circuit Court, sitting at Chambers.

THIS VIEW finds support in a case decided in the chancery division, of the British Supreme Court of Judicature, in 1883, [21] *In Re Gadd* (*Eastwood* v. *Clark*). In that case a testator by his will, appointed his wife and another, executors and trustees of his estate, and provided "that on the death, refusal, or incapacity to act of any trustee or trustees, the surviving or acting trustee, his executor or administrator might appoint a new trustee or new trustees as occasion might require," etc. The wife died leaving the other trustee surviving. A beneficiary under the will, in an action for the administration of the estate, obtained judgment to the effect that "some proper person be appointed a trustee of the testator's will in the place of the said Mary Gadd, and jointly with the defendant, the existing trustee." Thereafter, the beneficiary mentioned, nominated Eastwood, and the surviving trustee nominated Whitely. The court made an order appointing Eastwood as joint trustee with the defendant. The defendant appealed, and the court, consisting of three Lords' Justices, including the Master of the Rolls, decided that the appointment could not stand, adding: "If the plaintiff wishes to take objections to the fitness of the defendant's nominee the case will be referred back to the Vice Chancellor to consider the objections. If they are allowed, then the defendant must nominate some other person, subject to the approval of the court." It will be observed that nowhere in the will there under consideration

was there any suggestion that any court should have a power either to appoint, confirm or reject any nomination that might be made by a surviving trustee. And yet, under general principles of equity, the court decided that chancery holds that supervisory power over all such nominations and appointments. The language of the will in that instance was much more positive than here, and yet as we have seen the court construed it to be subject to the authority of the court to pass upon the nomination, and approve or reject it.

ASSUMING, for the purposes of this argument, but not conceding or deciding, that the Justices of the Supreme Court may still exercise the right of choice and of nomination of a new trustee to the Circuit Judge sitting in Equity, and treating the purported "appointment" of Mr. WILLIAMSON as such a choice and nomination, this Court respectfully declines to confirm, or to appoint Mr. WILLIAMSON to the position to which he has been thus ostensibly chosen and nominated. As above expressed, there are no objections to the moral, intellectual or business qualifications of Mr. WILLIAMSON, but this Court feels that, in the administration of a quasi public trust of this magnitude, which has undertaken and is conducting a comprehensive scheme and system of education of the Hawaiian youth, of both sexes, and resident in all parts of the Territory, [22] it is at least reasonable, even if not logically imperative, that the Hawaiian race should be represented in the administration of such trust, and granted the privilege of there expressing, advocat-

ing and promoting the ideals, ambitions and aspirations of the Hawaiians as a people, with respect to the manner in which the youth of that race shall be educated, and the conditions under which their attendance at school shall be conducted. As above remarked, there is no evidence of record to show that Mr. WILLIAMSON possesses any of the peculiar qualifications herein recited. It has been urged upon argument that Mrs. Bishop, the donor of this trust, herself an "Hawaiian of the Hawaiians," made no choice of an aboriginal Hawaiian to serve upon the board of trustees, but selected only those of foreign blood or birth. It may be that this argument should have been accorded decisive weight in the years that are gone, at least during the first, or possibly, during the second decade of the existence of the trust. But it must be remembered that the Boys' School in question has been in practical operation some twenty-nine years; that it has graduated no less than twenty-six classes, containing many hundreds of Hawaiian boys; that the first of those classes has now been graduated twenty-five years, and that its members, as well as scores of members of succeeding classes have, since this trust was established, and following their graduation, had many years of intercourse, not only with the members of their own race but with the community in general, in which, as we are proud to claim, Anglo-Saxon ideals of life and government have been and are being most satisfactorily promoted and observed. It would therefore, in my opinion, be a gross slander upon the Hawaiian race, and especially upon the

hundreds of male Alumni of Kamehameha School, to assert that no member of that race is now fitted to discharge the duties which devolve upon a trustee under the will of Mrs. Bishop. If, as has not been shown, and I am unwilling to believe, that School, so conducted by a board of Anglo-Saxon trustees during a period of twenty-nine years, has not succeeded in producing one man who is mentally and morally fitted for the discharge of the duties of such trusteeship, then, in my opinion, it is high time to inaugurate such a revolution in the *personnel* of the board as will insure the adoption of such a course of education at the School in question as will more nearly conform to the objects of its most generous founder.

BUT, IT IS INSISTED, on behalf of the trustees, that the language quoted from the Fourteenth paragraph of the will confers the power of "choice" or "appointment" of new trustees upon the Justices of the Supreme Court *as individuals,* [23] and not upon the court as a judicial tribunal, or upon its members acting in a judicial capacity. The reverse of this proposition has been assumed in a former portion of this opinion, but this claim may be here examined in detail, to the end that we may be convinced of its validity, or otherwise. At this point I desire to state that I have read and pondered, and, with respect to many of the decisions, have re-read, every line of legal literature cited to me at the argument, in addition to which I have pursued a research on my own behalf which I believe to be virtually exhaustive of the subject, at least within the limits of our library facilities, which are by no means slender.

As a result of this research and study, I am persuaded that the position assumed by the counsel for the trustees, as well as by the *Amici Curiae* above referred to, is not sustained in reason or principle, although, it must be admitted there are court decisions which, considered *solis*, might support their position. The argument appears to narrow itself down to the question whether a power of appointment conferred upon a judicial officer, or rather, upon the incumbent of a judicial office, without naming him, shall be taken as an intention to confer the power upon the individual who, at the specific period when such appointment is to be exercised, holds the judicial office in question, or whether it shall be construed as an intention to confer such power upon the court of which such judicial officer is a member, or over which he presides? Otherwise expressed, it is a question whether a power of appointment conferred upon "a majority of the Justices of the Supreme Court" shall be construed as authorizing the persons who, at the date of any request for the appointment of a trustee, chance to fill those offices, and acting in their individual, as distinguished from their judicial capacities, to "choose" or "appoint" a new trustee—or whether the power of choice or of appointment (in whichever of these two ways the language of the will may be construed), was conferred upon the Supreme Court, as a whole, and acting judicially.

IN THE FIRST PLACE, let it be noted that there was, at the date when the will was executed, as also when it was probated, no legal obstacle to mak-

ing the Supreme Court of Hawaii the donee of the power of appointment, in the event of vacancies arising in the board of trustees. Whether such appointment, in the absence of statute providing a different course falls under the probate or under the equity jurisdiction (I incline to the view that the latter is the appropriate division), it is clear that the Supreme Court, as well as its individual Justices were then invested with the necessary jurisdiction to act. I find no obstacle to this conclusion in the phrase employed [24] in the will—"a majority of the Justices," etc., because courts of necessity act by majorities where they are composed of several judges. It was therefore a most natural and logical donation of the power of appointment to a judicial body having full and ample jurisdiction in the premises, but evincing a desire that such appointments should be the result of the concurrence of more than one mind. At the date of the will, as the writer of this opinion is aware from personal residence, observation and legal practice at this bar, there was virtually no local sentiment, belief, prospect or expectation that the judicial system that then prevailed in Hawaii would be disturbed or altered so as to withdraw from the Supreme Court and its Justices the probate and equity jurisdictions which they then exercised. In fact, our Supreme Court, in those times, much more than in times nearer the present, was considered in its relation to the general scheme of government in Hawaii, very much as the "Rock of Gibraltar" has long been considered in its relation to the fortresses of the world. The court was, in fact,

often likened unto the Rock of Gibraltar with reference to its stability and endurance, both past and prospective. There is therefore no doubt in my mind that it was the intent and purpose of the testatrix to confer upon the Supreme Court, as a judicial tribunal, the power of appointment in the premises. In this respect she avoided an error which frequently crops out in legal literature, viz.: that of attempting to confer a jurisdiction upon a tribunal which was not by law authorized to exercise such jurisdiction. For it is a cardinal rule of jurisdiction that:

> "It is not in the power of a testator to confer upon a judicial tribunal a jurisdiction which is not conferred by law."
>
> Shaw v. Paine, 12 Allen, 293, 296.
>
> In Re Estate of Bernice Pauahi Bishop, 11 Haw. 33.

THE VIEW that the Supreme Court, as a judicial tribunal, was intended to be, and was in fact and in law the donee of the power of appointment herein, finds strong support in the procedure taken upon the occurring of the first vacancy in said board, hereinabove discussed. It was manifestly the view of the only lawyer (Mr. Smith), appointed in and by the will as such trustee, that the jurisdiction to accept his resignation and appoint his successor lay in the Supreme Court, acting judicially, and the record of the proceedings had in that court, upon the presentation of said resignation and the appointment of Mr. Smith's successor, is strongly confirmatory of the [25] position here assumed by me, and that procedure, from first to last, is significant and persua-

sive as furnishing an example of that "contemporary construction" of the will, by parties concerned, which, in cases of doubt, not only with respect to wills but also with respect to contracts and statutes, has ever been strongly relied upon by courts when called upon to construe the documents involved.

> "When the language of an act is doubtful in its meaning, and cannot be made plain by the help of any other part of the same statute, or of any act in *pari materia* which may be read with it, or in the course of the common law up to the time of its passing, the court may consider what was the construction put upon the act when it first came into operation."
>
> Per Magie, Justice, State v. Kelsey, 44 N. J. Law 1, 47.
>
> "Where the language of a contract is of doubtful construction, the interpretation by the parties themselves is entitled to great weight."
>
> Steinbach v. Stewart, 11 Wall. 566; 20 Law Ed. 56.
>
> "The practical interpretation of an agreement by a party to it is always a consideration of great weight; and there is no surer way to find out what parties meant than to see what they have done.
>
> Brooklyn Life Ins. Co. v. Dutcher, 95 U. S. 269; 24 Law Ed. 410.

THERE IS NO SUBSTANTIAL difference in the rules of construction to be applied to a will, from those applicable to a contract. In either, the intention of the testator on the one hand, or of the con-

tracting parties on the other, is to be regarded as the "Pole Star" by which the mind of the court is to be guided to a conclusion.

BUT, IT IS INSISTED that the authorities support the contention advanced by the trustees, viz.: that the donation to a majority of the Justices of the Supreme Court was a donation of a power to be individually, and not officially or judicially exercised. They rely for support, in that contention, chiefly upon the case of *Shaw* v. *Paine,* 12 Allen, 293, 296, above cited. That was a bill in equity for specific performance of a contract, [26] and it involved the question as to whether the plaintiff was sole trustee under a certain will, or whether two other parties were joint trustees with him. It was a testamentary trust, with a provision that whenever any vacancy should occur in the number of the trustees, the surviving or acting trustees for the time being should nominate suitable person or persons *to be appointed by the judge of probate for the time being,* in the place of trustees declining, retiring or dying; and there was a limitation whereby the sons of the testator if living and willing to accept the trust, should first be nominated and appointed, and after them, others specified in the will. "And in default of such nomination and appointment I direct that a new trustee or trustees shall in every such case be appointed by the said judge of probate or by one or more of the Justices of the Supreme Judicial Court of this Commonwealth," etc. In Massachusetts, at the date of that decision (1866), there was a probate court presided over by a Judge of Probate, in addi-

tion to which the Supreme Court, and each of its Justices (as in the case of Hawaii when this will was drawn), exercised both probate and equity jurisdiction. Two of the original three trustees resigned their office, the sons and sons-in-law of the testator declined to accept the trust, and the plaintiff, as sole acting trustee, together with said sons and sons-in-law of the testator, presented to the judge of probate a petition setting forth the facts, and praying that the vacancies might be filled by the appointment of parties named by them as trustees to hold the property jointly with the plaintiff. And the judge of probate at a probate court appointed them accordingly. At that date two minor children were interested in the trust fund, who had no notice of the proceedings either in person or by guardian, prior to the appointment. And the point for decision was, whether the plaintiff, the surviving original trustee, could convey legal title to the property of the esfate. This involved the question as to whether the lack of notice to the minors mentioned invalidated the proceedings of the court of probate, regarded as a court, wherein it appointed two additional trustees. It was *held* that the action of the probate court, regarded as a court, in making such appointment, was void, *not* for lack of jurisdiction in the court, as such, to appoint trustees, but because of the failure to give notice to the minors referred to, or their guardians. There is, nowhere in the opinion a suggestion that the probate court, as such, was not intended by the will as the donee of the power of appointment,—but the holding is that its

action was invalid for want of notice to interested parties. The court, nevertheless, sustained the appointment [27] as a good and valid appointment *by the judge of probate.* The following language, relied upon the trustees herein, and quoted from p. 296 of the report, does not, in my judgment, deal with any fact arising in that case, for which reason it is to be considered as *obiter dicta,* and not authoritative. I quote:

> "If therefore a testator gives by his will to a judicial officer a power of appointment which the law does not give or sanction, their reference to the official character must be regarded as only a description of the person who is to execute the power."

EVEN if said quoted language be regarded as a part of the judgment in the case, it strikes me as being so illogical and generally unsatisfactory as to render it of no value as a precedent. It is tantamount to saying that, if A confers a power of appointment upon a judicial officer, without naming him, the first question to be decided is, whether the court over which that officer presides is invested by law with jurisdiction to make the appointment. If so invested, then it is a donation to the court as such; but if not so invested, then it is a donation to the individual. I must respectfully decline to follow such logic as this.

THE ONE OTHER Massachusetts case claimed to be an authority in the same direction, is *Nat. Webster Bk.* v. *Eldridge,* 115 Mass. 424, which was also a case in equity for a specific performance of an

agreement to purchase real estate. The will involved, provided for the filling of vacancies in the trusteeship as follows: in case of death, refusal to act, relinquishment of or removal from the trust, the surviving trustee or trustees should by sealed writing appoint trustees to fill such vacancy, "to be approved by said judge of probate, or by any justice of the Supreme Judicial Court of said Commonwealth;" and in default of such appointment, new trustees should be appointed "by the said judge of probate or by one or more of the said justices." The decision appears to place it, at least in part, upon a technical application of the rules of equity pleading, as follows: the bill having alleged "that the present trustees have received their appointments and have succeeded to the places of the original trustees in manner and form as provided by said will," the bill was demurred to, and the court, at p. 427, quotes said allegations from the bill and remarks that "by the demurrer the facts are admitted to be as set forth in the bill." The procedure actually followed was that the surviving trustees, after the death of one, appointed one Dorr to fill the vacancy, and that appointment was approved by the judge of [28] probate. Thereafter, two of the three resigned, and the sole remaining trustee appointed, and the judge of probate approved of Lawrence and another, Dorr, in their stead. Still later another vacancy having occurred through death, one Bryant was approved by the judge of probate, upon the nomination of the remaining trustees, all without notice to heirs or beneficiaries. The board of trustees as thus finally consti-

tuted (Lawrence, Dorr and Bryant), sold certain of the realty pertaining to the estate at public auction; plaintiff became a purchaser and received conveyance thereof from the trustees and had ever since continued seized and possessed thereof. Thereafter, plaintiff having contracted to sell, and the defendant to buy said property, defendant refused to execute the contract upon the ground that plaintiff could not convey good title thereto. And the defendant's demurrer was based upon the alternative grounds that (1) if the appointment of trustees under the will, or the approval thereof, was vested in the probate court, and the judge of probate in his official capacity, all of said appointments were void, for want of notice and for want of bond; (2) if said appointments and approval were vested in the individual holding the office of judge of probate, and not in the court, as such then, upon each and every such appointment and approval made under said will, there should have been conveyances from the respective trustees to their successors in the trust, which had not been done. The decision is based upon several grounds, the final one being that the trustee Dorr, having been one of the original trustees appointed by the will, and having, after commencement of the suit, conveyed all of his right and interest in the legal title to the new trustees, and the original deed to the plaintiff having been confirmed by a new deed from all of the trustees subsequent to the conveyance by the original trustee to his co-trustees, that series of conveyances "removes whatever doubt there could have been before as to the sufficiency of the plaintiff's title."

And apparently more upon the strength of this last state of facts than of anything else in the case, the demurrer was overruled. But, in the opinion, the court, citing *Shaw* v. *Paine, supra,* (which, as above, I disapprove and decline to follow), holds that the procedure in the probate court "was not a judicial proceeding, and therefore required no notice." And the opinion further holds that "upon such an appointment the judge of probate acts under the authority conferred upon him by the terms of the will, and not by virtue of his general authority as a court or judicial officer under the statutes establishing the court and defining its jurisdiction." If we accord to these two Massachusetts decisions the utmost effect that can be claimed for them, I still respectfully indulge the privilege of believing that they are illogical in argument and conclusion, and unsound in principle. These cases have been cited in other jurisdictions in numerous cases, since their rendition, but in none that I have seen has their citation [29] been appropriate or necessary to the decision actually made, nor have they been followed in actual decision elsewhere, so far as I have been able to find. This leaves me to comment upon the fact, well known to all lawyers, that any given opinion is an authority only to the extent to which the actual decision goes. There is such a bewildering mass of *obiter dicta* permeating the general volume of American court decisions, that many courts and commentators of whom better things should be expected, have frequently been, as they will be in the future, mislead into adopting such *dicta* as express-

ing the law decided in the cases respectively. I have endeavored to analyze the decisions cited to me, and which I have otherwise found, in my study of this case, in order to separate the pertinent from the impertinent matter with respect to the questions involved.

THE CONNECTICUT DOCTRINE is found in *Wilcox's Appeal,* 54 Conn. 320. A testator having made in a will certain other provisions, gave the residue of his property in trust for his daughter, with the provision that at her death it should be divided into sixteen equal shares and given to persons named. Trustees were appointed, and the provision for the filling of vacancy was that "a trustee to fill such vacancy shall be nominated to the *judge of probate* by at least one-third of the devisees above named," etc. A trustee's place became vacant. Ten of the seventeen persons to whom the sixteen shares of the trust fund were given nominated to the judge of probate as a suitable person to fill the vacancy, one Wilcox. Five of the persons interested in said sixteen shares, uniting with the widow and daughter, nominated one Steadman. "The probate *court* appointed Mr. Steadman and refused to appoint Mr. Wilcox. An appeal was taken from the decree appointing Mr. Steadman and also from the order refusing to appoint Mr. Wilsox. The superior court reversed the decree appointing Mr. Steadman, but took no action on the decree refusing to appoint Mr. Wilcox. Both parties appealed to this (Supreme) Court" (p. 322). It would appear from the record that no one connected

with the case for a moment dreamed of asserting an individual right in the judge of probate to approve and appoint such nominees, or of suggesting any lack of jurisdiction in the court of probate, acting judicially to so pass upon such nominations and make such appointment. Consequently, the particular and decisive point here involved was not there argued or expressly passed upon, but the supreme court stated one of the two points involved to be as follows: "Has the *court of probate* a discretion to refuse to appoint a suitable person duly nominated according to the terms of the will?" And this question is discussed on pp. 325–6 of the report, wherein the court recites that the statute of Connecticut provides that if no provision is made for the appointment of testamentary trustees, or filling vacancies in a number appointed by testament, [30] the court of probate may appoint. And it decides that "the *court of probate* would doubtless have power to reject the nominee for any cause impeaching his integrity or capacity." I call especial attention to the following language from the opinion (p. 325), as bearing upon the question here involved, viz., whether the donation of a power of appointment to the justices of the Supreme Court is to be regarded as the donation of such power to the court itself, acting judicially? I quote:

> "It may be fairly inferred from the fact that the action of the court of probate is invoked, that the testator intended that the nomination should be rejected for good cause shown. It is

not a case for the exercise of discretion, but a case calling for the exercise of legal judgment."

ANOTHER Connecticut case, strongly favorable to the position here assumed, is Allen's Appeal, 69 Conn. 702, 707. There was a testamentary trust conferred upon five trustees, with a provision that if the number should be reduced to two, "the judge of probate" in the testator's district, should appoint a third, and in so doing should regard the wishes of the existing trustees or the persons interested in the estate, so far as he believes he can with safety to the estate, but no further. Three trustees having died, the two survivors expressed no wish as to who should fill the vacancy, and the beneficiaries could not agree upon a nomination, whereupon a beneficiary under the will filed in the court of probate a request for the appointment of a third trustee, nominating her son, but the court appointed a third party, who was unconnected with the testator's family or relations, and whose appointment had not been requested by any of them. And the supreme court expressly held, upon appeal (p. 707), that "it is obvious that by the term 'judge of probate' the testator meant to describe the court of probate for the district of Windsor. * * * It was, therefore, the court of probate which the testator must be deemed to have had in mind, in directing as to the exercise of the power of appointment, although his reference to the 'judge of probate' of this district, had it stood alone, might have been taken to apply to that individual who, for the time being, should be occupying that office." The latter

part of the quotation alludes to a second reference in the will to the "judge of probate," in connection with the fixing of bonds, etc. The Connecticut court makes a misquotation in support of its conclusion, viz., *Bishop* v. *Bishop,* 54 Conn. 232. The error consists in this, that the reference is obviously to Wilcox's Appeal, above cited, as to which the paging is correct; while the case of Bishop v. Bishop proceeds upon entirely foreign [31] matter. It may be convenient at this point, to bring the present case within the effect of the language used by the Connecticut court in the above opinion, and which is represented by the foregoing *asterisks.* It is this (69 Conn. 707):

> "The rule of construction that words occurring more than once in a will shall be presumed to be used always in the same sense, unless a contrary intention appears by the context, or they be applied to a different subject, applies with double force where the word in question is found in two sentences in immediate succession."

WE HAVE SOMETHING in the will of Mrs. Bishop that very nearly fits the description of this quotation. The donation of the power of appointment of trustees, is, as above, contained in the fourteenth paragraph of the will. In the thirteenth paragraph we find the following language:

> "I also direct that my said trustees shall annually make a full and complete report of all receipts and expenditures and of the condition

of said Schools to the Chief Justice of the Supreme Court, or other highest judicial officer in this country."

IN WHAT SENSE did the testatrix use the phrase "Chief Justice of the Supreme Court, or other highest officer in this country?" I refer to a decision by our own Supreme Court for an answer to this question, and also strong support for the conclusions which I have reached in this cause.

IN RE ESTATE OF BERNICE PAUAHI BISHOP, 11 Haw. 33, deals with one of the annual reports provided for in the language above quoted, to be presented to the Chief Justice of the Supreme Court. This was in the year 1897, four years after the Supreme Court had been stripped of its previously existing equity and probate jurisdiction. The report having been so presented, the Chief Justice (Hon. A. Francis Judd), referred the accounts to a master, who made a report thereon. The trustees took exception to the master's report, and, on a hearing the Chief Justice sustained the master's finding and report, and the trustees appealed to the Supreme Court. The Chief Justice, being disqualified to sit upon the appeal in a case involving his individual or personal rights and authority under the will, Circuit Judge Carter was called to the bench in his place, and the Court by which the question was unanimously decided, consisted of the late Justices Frear and Whiting, **[32]** and Circuit Judge Alfred W. Carter, who, by a somewhat remarkable coincidence happens to be one of the trustees in whose behalf the claims above recited are

now put forth in the case at bar. The opinion was written by Mr. Justice Whiting, and, on p. 34 of the report he states, as the first point involved, the following:

> "Had the Chief Justice as a judge or court, any power or authority to hear and decide upon the matters submitted to him under the will?"

and, as the sole remaining point:

> "Is there any appeal from the decision of the Chief Justice of the Supreme Court to the Supreme Court itself?"

AND THE COURT, after disposing of the second point by a decision in the negative, uses language at pp. 35–36, from which I take the privilege of quoting liberally, as follows:

> "As to the first question raised, we are of opinion that the Chief Justice had no judicial jurisdiction to hear and determine, as a court or judge, the matters presented to him, and at most he could be, while acting thereon, a mere arbitrator or referee, and the record made cannot be considered as a judicial record of the Supreme Court or a Justice thereof, and it is void as a judicial decision. Prior to the Act of 1892, Chap. 57, the Chief Justice might well have been considered as acting as a judge with jurisdiction over the subject matter, for he then was invested with original jurisdiction in probate and equity, and could hear such matters at chambers, and there was an appeal from the decisions rendered by a single Justice to the Supreme Court.

"It is claimed that the necessary jurisdiction is conferred on the Chief Justice by the will, but this can only be advanced on the theory of jurisdiction being conferred by consent of parties. Parties can only confer jurisdiction *in personam* by consent, but where the court has no jurisdiction of the subject matter, no consent of parties can give jurisdiction.

"12 Am. & Eng. Encyc. of Law, 300, *et seq.*

"The Judges of the Circuit Courts at Chambers have original jurisdiction in probate and equity, and all **[33]** such matters pending in the Supreme Court were transferred to the Judges of the First Circuit Court by the Act of 1892. And I am of opinion that the annual accounts of the trustees should have been presented to a Judge of the First Circuit Court for settlement, as it was one of the matters annually pending in the Supreme Court, and so transferred by the Judiciary Act of 1892. Further, the Chief Justice of the Supreme Court being now without jurisdiction in this matter, I am of opinion that the language in the will (providing for the report to the Chief Justice) *'or other highest judicial officer in this country'* can without forced construction mean 'other highest judicial officer' *having judicial jurisdiction* over the subject matter of the same nature as this,—that is, annual settlement of trustees' accounts under a will probated hereto-

fore in the Supreme Court; and that such highest judicial officer would now be one of the Judges of the First Circuit Court. Our procedure and practice has been that the probate court in which a will containing provisions for trustees to hold and manage the property bequeathed for trust purposes, has been probated, retains jurisdiction over such trusts and requires annual accounts of the trustees to be rendered and passed upon. As to trusts other than those in probate, a court of equity has general jurisdiction. Mr. Justice Frear and Judge Carter, however desire to express no opinion on the views set forth in this paragraph."

THE ILLINOIS DOCTRINE, as I interpret it, is entirely favorable to the view which I have taken here. The earliest case in that jurisdiction which we find cited in *Morrison* v. *Kelly,* 22 Ill. 609. It was an action in ejectment, and involved the validity of the appointment by the Circuit Court of La Salle County of a trustee to fill a vacancy arising in a trust created by deed. The deed conferred such power of appointment upon "the Court of Chancery of the judicial district or circuit in which La Salle County shall then be situated." That court, acting judicially, appointed Morrison as trustee in place of a deceased trustee, and the decree purported to vest in the new trustee the legal title, etc. The Supreme Court (p. 623), used this language:

"It will not be contested that a grantor conveying to a trustee, may confer upon an officer,

as the Chief Executive of the State, a Circuit Judge, a Probate Judge, or upon any Court of Record, the power to [34] appoint a trustee in the event of the death of the trustee named in the deed. Then, if it was the object of the clause in this deed to confer upon the Circuit Court of La Salle, such a power, as soon as Reed's death occurred, the Court became invested with jurisdiction to appoint a trustee, and such jurisdiction would not depend upon acquiring jurisdiction of his heirs or personal representatives."

IN *Leman* v. *Sherman,* 117 Ill. 657, 664, the rule which might be implied from the above quoted language in the *Morrison* case, wherein the court states that "any Court of Record" may be the donee of such power, was modified and limited to Courts of Record invested with either such general equity jurisdiction or such statutory jurisdiction, either in equity or in probate, as authorize them to make such appointments.

In the *Leman* v. *Sherman,* case which was a bill in equity for the removal of Leman as trustee of the Sherman estate, and for the appointment of a new trustee in his place, the interests involved were large, including the famous Sherman House Hotel in Chicago, and the case was elaborately presented. The trust involved was a testamentary trust, to one Marsh, with the provision that, "in case of the death, resignation, refusal or inability to act of said trustee, I hereby direct that a new trustee be ap-

pointed by the *County Court* of said County, upon the application of any person interested, and the notice to all persons interested," etc. Marsh acted under the trust for some years and then resigned. In 1875, the County Court appointed one Taylor to the trusteeship as successor to Marsh. Taylor served until 1881, when he died. Promptly thereafter a daughter of the testator filed her petition in the *County Court* of Cook County, asking for the appointment of a trustee as successor to Taylor, and for summons in chancery to bring in all the defendants, which was done. Soon thereafter the *County Court* entered an order in said proceeding, sustaining the petition, and decreeing "that the prayer of the bill of complaint be, and the same is hereby granted, and that Henry W. Leman be, and he is hereby appointed as successor in said trust to George Taylor," and purporting to vest title to the trust property in said Leman as such trustee. Leman qualified and entered upon the discharge of the trust, and the plaintiff, Sherman, brought this suit to procure his removal as such trustee and the appointment of another in his place. One of the points insisted upon by the plaintiff was "that the power of appointment conferred upon the County Court by the will, and the exercise of that power by the County Court, in the appointment of appellant (Leman), in the manner already indicated, are illegal and void." [35]

IT IS ONLY in this latter point and the manner of its disposition, that we are interested in the present case. The Supreme Court, in its opinion, says:

"The testator, undoubtedly, intended to confer the power of appointing a successor to the trustee, named by him, upon the County Court, *as organized when his will was made.* At that time, the County Court had jurisdiction in all matters of probate and the settlement of estates of deceased persons. It was, unquestionably, his intention to authorize the appointment to be made by the same Court in which his will would be admitted to probate, his executors would be qualified, and his estate would be administered upon. Since his death, however, a new Probate Court has been created in Cook County, and all jurisdiction, in matters of probate, has been taken away from the County Court, so called. Appellant's appointment was made by the County Court as it existed after its probate jurisdiction was taken from it, and vested in the newly created Probate Court. It is very evident, therefore, that, however necessary it may be to consider and give effect to the actual intention of the testator in the interpretation of his will, it was never really his intention to confer the power of appointment upon the County Court, as it was organized, when the order of April 15, 1881, was entered. Independently, however, of this consideration, neither the County Court, which existed when the testator made his will, and at the time of the death, nor the County Court which assumed to make appellant the trustee of the estate, could lawfully exercise the power conferred by

this will. It is sought to uphold the power, on the ground, that it was conferred upon the Judge of the Court, and not upon the Court itself. *Where it is manifestly the intention of the testator* to name the particular individual, who holds the office of Judge, as the donee of the power, his designation as Judge of a Court will be disregarded as mere *descriptio personae,* and the power will be sustained, as vested in the man, and not in the office. No such construction however, can be given to the language of the will, now under consideration. The power of appointment was intended to be conferred upon the County Court of Cook County, *as a tribunal.* Such is the plain import of the words used." **[36]**

AND SO, in the case at bar, I feel that the language above quoted, especially that with reference to the manifest intention of the testator that the appointment of successive trustees should rest *in the Court in which his will should be probated,* etc., is peculiarly applicable and significant. Again, if the phrasing of Mrs. Bishop's will had been such, as, in the language of the Illinois Court (slightly paraphrased to fit the facts), to stamp it as having been "manifestly the intention of the testatrix to name the particular individuals who hold the offices of Justices of the Supreme Court, as the donees of the power," a different conclusion might be warranted herein.

THE MISSOURI DOCTRINE is set forth in *Harwood* v. *Tracy,* 118 Mo. 631, 636–7–8. That

was an action in ejectment, involving the validity of the appointment of a trustee to fill a vacancy, under a trust created by deed. The trustee named in the deed was authorized to lay out a town plan, said town to be known as "Careron," and all deeds to be made in the name of the "Cameron Town Company." The provision for the appointment of a successor was that in the event of the death or removal from the County of Clinton * * * or the resignation of said trustee, or if, from other cause, he or any successor of his should in the opinion of the majority of the members of said Company in interest become disqualified for the performance of his duties as such trustee—the *County Court of Clinton County, Missouri, may, and is hereby requested, upon the application of any one member of the Company to appoint,* etc., a successor, with provisions for the acceptance of the trust by such successor, and his qualifying by the giving of bonds, etc. If the County Court of Clinton should refuse or fail to execute such request, a majority of the Company in interest or their personal representatives, might select a trustee under the above-named conditions.

THE DEED OF TRUST was executed in 1855. In 1856, the trustee appointed by the deed having resigned, certain other parties interested in the property filed in the County Court of Clinton County their request for the appointment of a successor by such Court. And the Court, consisting of several judges, proceeded to act upon said request, judicially, and appointed the nominee named in said request, who accepted the appointment and quali-

fied. The principal points involved were whether the record of said proceedings had in the County Court were properly admitted in evidence, over objection by the defendant, and whether a deed thereafter executed by the appointee of the Court, one Baubie, as such trustee, conveyed title. The decision, while recognizing, as a host of such decisions do that "one who creates a trust may mold into it whatever form he pleases," and that he may provide in any manner suitable to him, for the appointment of trustees, either originally, or to fill vacancies, and that such provision will be enforced by the courts, if it be a legal **[37]** one, and that "the Courts of Chancery delight to effectuate the intention of the testator or grantor," proceeds to define the "one limitation upon this power of appointment or revocation"; it must be conferred upon a person, corporation or agency, not incapable, legally, of performing it; And the opinion proceeds:

> "This record presents a case of a power conferred upon an inferior court, a court having no chancery or equity powers, either when the deed was executed, or since that time. Three distinct lines of cases may be found, in which courts have been appointed and empowered to fill vacancies in trusts: (1) If the Court was invested by the law of its creation with equity powers, there seems to be no doubt of its power to perform the function of supplying a trustee, for this would merely effectuate in part the purpose of its creation. *Morrison* v. *Kelly,* 22 Ill. 610; *Leman* v. *Sherman,* 117 Ill. 657; 1 *Perry*

on Trusts, Sec. 296. (2) In the second class, *where it is manifestly the intention* of the donor in the trust or the testator, to name the individual who is or may be the judge of a court, as the donee of the power, his designation as judge will be construed as mere *descriptio personae* and the power sustained, as in the cases of powers conferred upon other public functioners, the official characters being construed simply as equivalent to naming them by their proper names. (Same citations, adding *People* v. *Morgan,* 90 Ill. 558.) (3) The third class, and the one under which this case, in our opinion, falls, is where the donor attempts to vest the power in a court that has no jurisdiction by the law of its creation, to take such an appointment. In such a case it is held that the appointment is void. That the grantor, testator or donor cannot by his consent confer this jurisdiction upon the court."

IT WILL BE OBSERVED that the language of the court as respects the first two classes of cases above described is *obiter dicta,* notwithstanding which fact, I have no quarrel with the legal postulates therein set forth; but it must be remembered that we are here dealing with a case where the original donation of power was to a court which, at the date of the will, and for nearly a decade thereafter, was invested by the law of its creation with equity powers, and was therefore valid, while the law remained in that condition. But upon the withdrawal from the Supreme Court and the Justices [38]

thereof, by the Judiciary Act of 1892, of all equity, probate and other jurisdiction at chambers, the donation lost its force expired, and could no longer be exercised by the Supreme Court or its Justices any more than if that Court and its Justices had been originally ineligible or disqualified to exercise the power of appointment.

A FURTHER EXCERPT from the opinion of the Missouri case becomes interesting in view of the fact that, as held at an earlier place in this opinion, our Supreme Court entertained jurisdiction of the resignation of W. O. SMITH, addressed to it *as a Court,* and that the order which it promulgated in the premises is entered and signed by the clerk in the same manner as other judicial decrees or orders. The language referred to, in the Missouri opinion, is this (p. 639):

> "In such a case it is our duty to give the words used their ordinary signification, and hold that when he (the grantor) said *Court* he meant *a Court.* Beyond all question, it was so interpreted by the County Court itself. It took cognizance of the matter as a duly organized judicial body. It made or attempted to make its appointment by an entry on its record, *the only manner in which, as a Court, it could speak.*" (Last Italics are mine.)
>
> "If it be said that innocent parties might suffer, the answer is, the danger is no greater in this than in thousands of other instances in which parties are mistaken in title. The power was attempted to be executed by the County

> Court, whose jurisdiction is defined by public laws, of which all persons are bound to take notice."

THE TESTATRIX in this case "took notice" of the jurisdiction of the Supreme Court and of its Justices, to appoint trustees. But this Court, at the present juncture, is obliged to "take notice" that the jurisdiction in question has been withdrawn from the Supreme Court and its Justices, and conferred upon this Court, sitting in equity.

THERE IS A RHODE ISLAND decision which impinges slightly, but directly upon the principles here involved—*Griswald* v. *Sackett,* 21 R. I. 206. It was a bill in equity for the appointment of new trustees to fill vacancies in a board named by a testator, and was heard on a demurrer to [39] the bill, setting up a manner of filling those vacancies provided for in the will, as exclusive of other powers of appointment. The original scheme of appointment fell through, and became inoperative because the surviving trustee refused to join in the application to the court for such appointment, which application was provided for in the will. The defendants claimed that until such survivor should join in such petition there was no authority or jurisdiction in the court to make such appointment. But the court, in overruling the demurrer, held as follows:

> "The provision for the appointment contained in the will has become ineffectual, but the court has power to make the appointment under its general chancery jurisdiction."

IT IS NEEDLESS TO MULTIPLY AUTHORITIES upon this point, but *Leman* v. *Sherman,* 117 Ill. p. 657, is directly in point.

> "When a power of appointment is conferred upon another, and the mode of its execution is defined, the power can be exercised only in strict conformity with the terms of the grant. . . . . If there be any irregularity in the mode of exercising the power, the appointment will be void."
>
> 39 Cyc. pp. 274–5;
>
> Sugden on Powers (1st Am. Ed.), pp. 210, 211.

THE ENTIRE SUBJECT of the appointment of new trustees under a power in the instrument is dealt with in the Cyclopedias as follows: 39 Cyc. 271 et seq.; 28 Am. & Eng. 961, 964, et seq.

A VIEW CONTRARY to that which I have herein expressed is found in *Moore* v. *Isbel,* 40 Iowa, 383, 386, et seq. That was a suit in chancery to set aside the title of defendants to certain lots in Sioux City, based upon a sale and conveyance under a trust deed. Many circumstances of misrepresentation and other fraud are alleged against one Leech, who pretended to act as trustee in making the sale sought to be set aside. The deed provided that "in the case of the death, disability or refusal of the said Campbell (trustee named in the deed) to act, then the acting County Judge of the County Court of Woodbury County was authorized and requested to appoint a suitable person to act as such trustee," etc. [40] Without any resignation or refusal to act on the part of Campbell, there was an applica-

tion to the County Court to appoint Leech as trustee in his place. The County Court, acting judicially, undertook and purported to appoint Leech to the alleged vacancy; and the Court held that the appointment by the Court, as such, would be upheld, under the circumstances although, it further held that the donation of power was to the Judge, and not to the Court, and that the appointment of the Court, presided over by the Judge, "will not be defeated because it is witnessed by the record of the County Court. The record is the evidence of the act of the County Judge, and shows that he exercised the power conferred by the trust deed." The decision seems to have gone off upon the effect of the word "acting," prefixed to the phrase "County Judge." The results arrived at by the Iowa Court appear to me to have been so grossly violative of all the principles of equity, when considered in relation to the many violations by the appointee of the Court, acting as such trustee, of the terms and spirit of the trust deed, that I can feel no confidence in the decision, even upon the point that it is here involved, and I therefore reject it, and "cast it over among the rubbish."

I HAVE RESERVED until the last the citation and discussion of what I consider the strongest case in support of the decision at which I have arrived. It is *Carr* v. *Corning,* 73 N. H. 362; 62 Atl. 168. There were two cases between the same parties, and they were considered together, one being a bill in equity for the construction of the will of one Pearson, and the other a petition for mandamus to com-

pel the defendant (who was the Judge of the Probate Court for Merrimack County), to consider and pass upon a petition filed by the plaintiffs in the Probate Court for that County. The will in question provided for the filling of vacancies in the board of trustees, as follows:

> "The remaining trustees or trustee shall nominate and appoint in writing a successor or substitute to fill such vacancy, said appointment to be approved by the Judge of Probate for the County of Merrimack *for the time being.* (Italics are mine.)

A VACANCY occurred, and the plaintiffs, being the surviving trustees, duly nominated a suitable person as successor and filed in the Probate Court for Merrimack County, a petition requesting that the appointment be approved. The [41] defendant, who was the Judge of Probate, declined to consider the petition in his judicial capacity, but as an individual expressed his disapproval of the appointment, and these actions where thereupon brought.

LET IT BE NOTICED that this is the latest decision in point of time of any that has been cited in Court upon the argument herein, or that the Court has been able to exhume from the recesses of published reports. It was decided in October, 1905. A very able and exhaustive brief was filed on behalf of the defendant, in which many of the cases hereinbefore cited, as well as numerous others, were cited and commented upon. In particular, I call attention to the fact that the decision in *Shaw* v. *Paine,* 12 Allen, 293, relied upon by the trustees herein, was

before the Court, but does not appear to have met with its approval. The Supreme Court summarizes (p. 365) the contentions of the defendant (the Judge of Probate), as follows:

> "The defendant says (1) the power of approval is vested in him in his individual and not in his official capacity; (2) if it was the intention of the testator that the Probate Court should approve the appointment, the power of appointment fails because it is an attempt to confer upon the Court a jurisdiction not conferred by law."

THE FIRST POSITION of defendant above, is disposed of by the Court in stating that in the New Hampshire statutes pertaining to Courts of Probate, etc., the words "Judge" and "Judge of Probate" are constantly used when it is apparent the Probate Court is intended—and cites some examples, saying:

> "It is a matter of common knowledge that when a person attending to probate business or considering probate matters speaks of referring anything to the Judge of Probate, he usually intends the Probate Court, and not the person who exercises the function of that office. That is probably the sense in which Mr. Pearson used the words in his will, for the Probate Court has jurisdiction of wills and the estates of deceased persons. When he provided that the persons who were to administer the trust he was creating should be approved by the Judge of Probate, there is a [42] presumption that

> the Probate Court was intended; and the fact that the law makes it the duty of that Court to approve the appointment of trustees, makes that presumption so strong that the mere addition of the words 'for the time being' is not enough to rebut it."

DEFENDANT'S second postulate, viz., that if it was the intention of the testator that the Probate Court should approve the appointment, the power of appointment fails, for lack of jurisdiction in the Court to so appoint, is treated by the Court as unsound, and the Court cites the statute provisions which authorize the Probate Court to make such appointment. The opinion closes as follows:

> "Since the law makes it the duty of the Probate Court to approve trustees named in a will before appointing them, it is obvious that the mere fact that the testator made it the duty of the Probate Court to approve trustees named in accordance with the provisions of the will does not make it illegal for the Court to approve it, for it cannot be illegal for the Court to do its duty merely because some one requests it."

IF THIS OPINION has been extended to lengths which may appear unreasonable, such extension is due, in part, to the fact that I have been unable to find leisure in which to adequately condense it. Dwight Moody, the famous Evangelist, when criticised for the length of his sermons, is said to have replied: "I have not time to make them any shorter." Realizing the magnitude of the interests at stake, and appreciating that my conclusions

herein "fly in the face" of all procedure and precedent that have been observed in the filling of previous vacancies (since the going into operation of the Judiciary Act of 1892), and being further mindful of the fact that these conclusions are opposed to those reached and submitted to the Court by the *Amici Curiae* who so courteously and ably examined and argued the question at bar, I have felt it due not alone to myself, but to the opinions of those gentlemen, to examine these matters at length, and to point out, to the best of my ability, the reasons which induce me to disregard their advice as to the condition of the law involved. I therefore summarize my conclusions as follows:

1. That the power of appointment of trustees to fill [43] vacancies in the board created in and by the Will of MRS. BISHOP was, in and by said Will, conferred upon the Supreme Court of the Hawaiian Islands, as a judicial tribunal, and acting in its judicial capacity;

2. That, at the date of said Will, and thence until January 1st, 1893, said Supreme Court was invested with all the jurisdiction and powers necessary to the choice and appointment of such trustees;

3. That said power of appointment was not conferred upon the individuals who might, at any given period, chance to fill the offices of a majority of the Justices of the Supreme Court, acting in their individual, as distinguished from their judicial capacity.

4. In the alternative, that if said power was so conferred upon such Justices as individuals, it ex-

tended and extends, by virtue of said Judiciary Act, only to the point of choosing and nominating trustees to fill such vacancies for approval or disapproval, by the Circuit Court, or a Judge thereof, sitting in Equity;

5. That by virtue of the transfer from the Supreme Court to the Judges of the several Circuit Courts of the Equity jurisdiction previously existing in said Supreme Court, and its several Justices, which transfer was effected by said Judiciary Act, said Supreme Court has not, since December 31st, 1892, possessed the jurisdiction or authority to choose or appoint such trustees;

6. That the jurisdiction and authority to appoint such trustees having been lost by the Supreme Court, by statutory enactment, it is now vested in the Judges of the First Circuit Court, sitting in Equity, as a part of their general equity jurisdiction;

7. That, as the Judge of said Circuit Court now having charge of the Equity calendar, and "sitting in Equity," said jurisdiction and authority pertains and belongs to me;

8. In the alternative, if a majority of said Justices of the Supreme Court, acting individually, and not judicially, were invested with, and still retain the jurisdiction and authority to choose and nominate to this Court, sitting in Equity, for its approval or disapproval, a trustee or trustees to fill such vacancy, and if the naming of WILLIAM WILLIAMSON be regarded as such a choice and nomination, then said choice [44] and nomination are

hereby respectfully disapproved, for reasons set forth in an earlier part of this opinion;

9. That inasmuch as a vacancy in said board of trustees now exists owing to the resignation of SAMUEL M. DAMON as such trustee, and the judicial acceptance thereof, and as this Court has acquired jurisdiction in the premises by virtue of the petition or request of the remaining trustees for the confirmation of Mr. WILLIAMSON, it is appropriate that this Court should now make an appointment of such trustee to fill such vacancy.

10. WHEREFORE, by virtue of all the rights and powers me in anywise enabling in this behalf, I do hereby appoint CHARLES E. KING, an *Alumnus* of said Kamehameha School, of the first class graduated therefrom, to wit: the class of 1891, this appointment to become effective upon said appointee furnishing proofs satisfactory to the Court that he is a person of the Protestant religion, and upon his qualifying for said position, by entering into a joint and several bond to and with his associate trustees herein, in the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00).

A DECREE to this effect will be signed upon presentation.

Dated at Honolulu, this 29th day of July, 1916.

[Seal] (Signed) C. W. ASHFORD,
First Judge.

[Endorsement]: Eq. No. 2048. Reg. 2, pg. 297. Circuit Court, First Circuit, Territory of Hawaii, at Chambers—In Equity. In the Matter of the

Resignation of Samuel M. Damon, as a Trustee Under the Will and of the Estate of Bernice Pauahi Bishop, and the Appointment of a Successor to Said Trustee. Opinion and Decision. Filed at 10:20 o'clock A. M. July 29th, 1916. (Signed) J. A. Dominis, Clerk. [45]

In the Circuit Court of the First Judicial Circuit of the Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

APPOINTMENT OF TRUSTEE—EQUITY No. 2048.

In the Matter of the Resignation of SAMUEL M. DAMON, as a Trustee Under the Will and of the Estate of BERNICE PAUAHI BISHOP, and the Appointment of a Successor to Said Trustee.

Decree.

The petition of William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, the remaining trustees under the will and of the estate of Bernice Pauahi Bishop, deceased, praying the confirmation by this court of the appointment by the Honorable the Chief Justice and the Honorable the Associate Justices of the Supreme Court of the Territory of Hawaii, of William Williamson, as a trustee under the said Will and of the said estate, in place and in succession to Samuel M. Damon, resigned, coming on regularly for hearing before me, the undersigned First Judge of the Circuit Court of

the First Judicial Circuit of the Territory of Hawaii, presiding at Chambers in Equity, this 15th day of June, A. D. 1916, when the petitioners appearing by their attorneys and solicitors, Clarence Olson and Paul J. Bartlett, Esquires, and D. L. Withington, Antonio Perry and A. S. Humphreys, Esquires, appeared as *amici curiae,* and E. C. Peters, Esquire, upon permission of the court first had and obtained, appeared on behalf of strangers against said petition;

And evidence, both oral and documentary, having been introduced [46] on behalf of said petition and the same having been submitted and the Court now being fully advised in the premises;

THE COURT NOW FINDS AS CONCLUSIONS OF FACT:

First: That there are now but four (4) trustees under the will and of the estate of Bernice Pauahi Bishop, deceased.

Second: That a pretended and purported appointment of the said William Williamson as a trustee under the will and of the estate of said decedent, in place of and in succession to Samuel M. Damon, resigned, was heretofore made by the Honorable the Chief Justice and the Honorable the Associate Justices of the Supreme Court of the Territory of Hawaii, writing, dated June 9th, 1916;

Third: That the said William Williamson is in all respects qualified for such appointment, save one, namely: That it has not been made to appear that he is so qualified by length of residence in Hawaii

or by familiarity and sympathy with the history, manners, customs, language, ideals and aspirations of the Hawaiian people as to mark him out as a fit and suitable person to be appointed to an office where he will be authorized and expected to exercise a wise, benevolent and sympathetic discretion with reference to the education of Hawaiian youth of either sex, and concerning the general scheme, system and regulations to be adopted and observed during their attendance at the schools established under the trust ~~of~~ by said will created, and hence the said William Williamson for that reason is not a fit and proper person for such appointment.

(S.) C. W. A.
1st Judge.

Fourth: That Charles E. King, Esquire, is a person of the Protestant religion and is a fit and proper person to be appointed such trustee.

IT IS FURTHER BY THE COURT FOUND AS CONCLUSIONS OF LAW:

First: That the power of appointment of trustees to fill [47] vacancies in the board created in and by the will of Bernice Pauahi Bishop, deceased, was in and by said will conferred upon the Supreme Court of the Hawaiian Islands as a judicial tribunal and acting in its judicial capacity.

Second: That, at the date of said Will, and thence until January 1st, 1893, said Supreme Court was invested with all the jurisdiction and powers necessary to the choice and appointment of such trustees;

Third: That said power of appointment was not conferred upon the individuals who might, at any given period, chance to fill the offices of a majority

of the Justices of the Supreme Court, acting in their individual, as distinguished from their judicial capacity;

Fourth: In the alternative, that if said power was so conferred upon such Justices as individuals, it extended and extends, by virtue of said Judiciary Act, only to the point of choosing and nominating trustees to fill such vacancies for approval or disapproval, by the Circuit Court, or a Judge thereof, sitting in Equity;

Fifth: That by virtue of the transfer from the Supreme Court to the Judges of the Several Circuit Courts of the Equity jurisdiction previously existing in said Supreme Court, and its several Justices, which transfer was effected by the Judiciary Act of 1892, Ch. 57, said Supreme Court has not, since December 31st, 1892, possessed the jurisdiction or authority to choose or appoint such trustees;

Sixth: That the jurisdiction and authority to appoint such trustees having been lost by the Supreme Court, by statutory enactment, it is now vested in the Judges of the First Circuit Court, sitting in Equity, as a part of their general equity jurisdiction.

IT IS THEREFORE HEREBY ORDERED, ADJUDGED AND DECREED:

First: That the purported and pretended appointment [48] of William Williamson as a trustee under the will and of the estate of Bernice Pauahi Bishop, deceased, by the Honorable the Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii in place of and in suc-

cession to Samuel M. Damon, resigned, and dated the 9th day of June, A. D. 1916, be and the same is hereby declared null and void and of no force (and) or effect.

Second: That the purported and pretended appointment of William Williamson, considered as the "choice" of a majority of the Justices of the Supreme Court of the Territory of Hawaii, of the said William Williamson, to the office of trustee under the will and of the estate of Bernice Pauahi Bishop, deceased, in the place of and in succession to Samuel M. Damon, resigned, be and the same is hereby disapproved and rejected.

Third: That Charles E. King be and he is hereby appointed a trustee under the will and of the estate of Bernice Pauahi Bishop, deceased, in the place of and in succession to Samuel M. Damon, resigned, to act jointly with William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, the remaining trustees, for all the purposes of the said will and the trusts thereby created, such appointment to become effective upon said Charles E. King filing in this court a joint and several bond with his associate trustees herein, in the sum of $100,000.00, or in the alternative a good and sufficient bond with surety approved by this court in the sum of $20,000.00.

Fourth: That there be and there is hereby vested in said Charles E. King and the said William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, as trustees under the will and of the es-

tate of Bernice Pauahi Bishop, deceased, as joint tenants for the purposes and upon the trusts thereof, all and singular the property, real, personal or mixed now subject to [49] the will and of the estate of the said Bernice Pauahi Bishop, deceased.

(S.) C. W. A. 1st Judge.

Fifth: That the petitioners pay the costs of this proceeding.

Done at Chambers in the Judiciary Building in Honolulu, City and County of Honolulu, Territory of Hawaii, this third day of August, A. D. 1916.

(Seal) (Signed) C. W. ASHFORD,
First Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, Presiding at Chambers in Equity.

[Endorsement]: Eq. 2048. Reg. 2, pg. 297. Equity No. ——, Circuit Court, First Circuit, Territory of Hawaii. In the Matter of the Resignation of Samuel M. Damon as a Trustee Under the Will and of the Estate of Bernice Pauahi Bishop, and the Appointment of a Successor to Said Trustee. Decree. Filed 2:31 o'clock P. M. August 3, 1916. (S.) Huron K. Ashford, Clerk. E. C. Peters, 210–211 McCandless Building, Honolulu, T. H., Attorney for ————. [50]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

APPOINTMENT OF TRUSTEE—EQUITY NO. 2048.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Notice of Appeal and Appeal by the Trustees.

Come now William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, the petitioners in the above-entitled cause, and hereby give notice of appeal, and do hereby appeal, to the Supreme Court of the Territory of Hawaii, from the decision and decree made and entered in said cause by the Honorable C. W. Ashford, First Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, in Equity.

Dated, Honolulu, T. H., August 3d, 1916.

WILLIAM O. SMITH,
E. FAXON BISHOP,
ALBERT F. JUDD, and
ALFRED W. CARTER,
Said Petitioners.

By (Signed) HOLMES & OLSON,
Their Attorneys.

[Endorsement]: Eq. Reg., pg. 297. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers—In Equity. In the Matter

of the Estate of Bernice Pauahi Bishop, Deceased. Notice of Appeal and Appeal. Filed at 3:30 o'clock P. M., August 3d, 1916. (S.) B. N. Kahalepuna, Clerk. Holmes & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Petitioners. [51]

Certificate of Proof of Will.

Supreme Court of the Hawaiian Islands.

IN PROBATE.

I, LAWRENCE M'CULLY, Justice of the said Supreme Court, do hereby certify:

That on the 2d day of December, A. D. 1884, the annexed instrument was admitted to probate as the Last Will and Testament of BERNICE PAUAHI BISHOP, deceased; and from the proofs taken and the examinations had therein, the Court finds as follows:

That said BERNICE PAUAHI BISHOP died on or about the 16th day of October, A. D. 1884, that at the time of her death she was a resident of Honolulu, Oahu, that the said annexed Will was duly executed by the said decedent in her lifetime in Honolulu, in the presence of Frederick W. Macfarlane and Francis M. Hatch, the subscribing witnesses thereto; also, that she acknowledged the execution of the same in their presence and declared the same to be her Last Will and Testament, and the said witnesses attested the same at her request and in her presence; that the said decedent, at the time of executing said Will as aforesaid, was of full age, of sound and disposing mind, not under restraint, un-

due influence or fraudulent misrepresentations, nor in any respect incompetent to devise and bequeath her Estate.

IN WITNESS WHEREOF, I have signed this Certificate and caused the same to be attested by the Clerk of this court, under the Seal thereof, this 2d day of December, A. D. 1884.

[Supreme Court Seal]

(Signed) L. M'CULLY,
Justice of the Supreme Court.
Attest: (Signed) Henry Smith,
Deputy Clerk.

[Endorsed]: Supreme Court in Probate. In the Matter of the Will of Bernice P. Bishop, Deceased. Certificate of Proof of Will. Issued the 2d day of December, A. D. 1884. (S.) Henry Smith, Dep. Clerk. [52]

Will of Bernice Pauahi Bishop, Deceased.

KNOW ALL MEN BY THESE PRESENTS, That I, BERNICE PAUAHI BISHOP, the wife of Charles R. Bishop, of Honolulu, Island of Oahu, Hawaiian Islands, being of sound mind and memory, but conscious of the uncertainty of life, do make, publish and declare this my last Will and Testament in manner following, hereby revoking all former wills by me made.

Law No. 7505. Plaintiff's Exhibit D. Filed Oct. 5, 1915. (S.) B. N. Kahalepuna Clerk.

First. I give and bequeath unto my namesakes, Bernice Bishop Dunham, niece of my husband, now residing in San Joaquin County, California, Bernice Parke, daughter of W. C. Parke, Esq., of Hono-

lulu, Bernice Bishop Barnard, daughter of the late John E. Barnard, Esq., of Honolulu, Bernice Bates, daughter of Mr. Dudley C. Bates, of San Francisco, California, Annie Pauahi Cleghorn, of Honolulu, Lilah Bernice Wodehouse, daughter of Major J. H. Wodehouse, of Honolulu, and Pauahi Judd, the daughter of Col. Charles H. Judd of Honolulu, the sum of Two Hundred Dollars ($200.) each.

—Second— (Signed) BERNICE P. BISHOP.

Law No. 130 Plaintiff's Exhibit E. Filed May 15, 1906. (S.) M. T. Simonton, Clerk.

Second. I give and bequeath unto Mrs. William F. Allen, Mrs. Amoe Haalelea, Mrs. Antone Rosa, and Mrs. Nancy Ellis, the sum of Two Hundred Dollars ($200.) each.

Law No. 5265. Plaintiff's Exhibit D. Filed May 16, 1906. (S.) M. T. Simonton, Clerk.

Third. I give and bequeath unto Mrs. Caroline Bush, widow of A. W. Bush, Mrs. Sarah Parminter, wife of Gilbert Parminter, Mrs. Keomailani Taylor, wife of Mr. Wray Taylor, to their sole and separate use free from the control of their husbands, and to Mrs. Emma Barnard, widow of the late John E. Barnard, Esq., the sum of Five hundred Dollars ($500.) each.

[53]

Fourth. I give, devise and bequeath unto H. R. H. Liliuokalani, the wife of Gov. John O. Dominis, all of those tracts of land known as the "Ahupuaa of Lumahai," situated on the Island of Kauai, and the "Ahupuaa of Kealia," situated in South Kona, Island of Hawaii; to have and to hold for and during the term of her natural life; and after her decease to my trustees upon the trusts below expressed.

(Signed) BERNICE P. BISHOP.

Fifth. I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the Survivor of them, the sum of Thirty Dollars (30.) per month, (not $30. each) so long as either of them may live. And I also devise unto them and to the heirs of the body of either, the lot of land called "Mauna Kamala," situated at Kapalama, Honolulu; upon default of issue the same to go to my trustees upon the trusts below expressed.

Sixth. I give and bequeath unto Mrs. Kapoli Kamakau, the sum of Forty Dollars ($40.) per month during her life; to my servant-woman Kaia the sum of Thirty Dollars ($30.) per month during her life, and to —"— Nakaahiki (w) the sum of Thirty Dollars ($30.) per month during her life.

Seventh. I give, devise and bequeath unto Kapaa (k) the house-lot he now occupies, situated between Merchant and Queen Streets in Honolulu, to have and to hold for and during

—the— (Signed) BERNICE P. BISHOP.

[54] the term of his natural life; upon his decease to my trustees upon the trusts below expressed.

Eighth. I give, devise and bequeath unto Auhea (w) the wife of Lokana (k) the house-lot situated on the corner of Richard and Queen Streets, now occupied by G. W. Macfarlane & Co.; to have and to hold for and during the term of her natural life; upon her decease to my trustees upon the trusts below expressed.

Ninth. I give, devise and bequeath unto my husband, Charles R. Bishop, all of the various tracts and parcels of land situated upon the Island of

Molokai, comprising the "Molokai Ranch," and all of the live-stock and personal property thereon; being the same premises now under the care of R. W. Myer, Esq.; and also all of the real property wherever situated, inherited by me from my parents, and also all of that devised to me by my aunt Akahi,

—except— (Signed) BERNICE P. BISHOP.

except the two lands above devised to H. R. H. Liliuokalani for her life; and also all of my lands at Waikiki, Oahu, situated makai of the government main road leading to Kapiolani Park; to have and to hold together with all tenements, hereditaments, rights, privileges and appurtenances to the same appertaining, for and during the term of his natural life; and upon his decease to my trustees upon the trusts below expressed.

Tenth. I give, devise, and —"— bequeath unto Her Majesty Emma Kaleleonalani, Queen Dowager, as a token of my good will, all of the premises situated upon Emma Street in said Honolulu, known as "Kaakopua," lately the residence of my cousin Keelikolani; to have and to hold with the appurtenances for and during the term of her natural life, and upon her decease to my trustees upon the trusts below expressed.

Eleventh. I give and bequeath the sum of Five Thousand Dollars ($5000.)

—to— (Signed) BERNICE P. BISHOP.

[55]

to be expended by my executors in repairs upon

Kawaiahao Church building in Honolulu, or in improvements upon the same.

Twelfth. I give and bequeath the sum of Five thousand dollars ($5000.) to be expended by my executors for the benefit of the Kawaiahao Family School for Girls, (now under charge of Miss Norton) to be expended for additions either to the grounds, buildings or both.

Thirteenth. I give, devise and bequeath all of the rest, residue and remainder of my estate real and personal, wherever situated, unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools. I direct my trustees to expend such amount as they may deem best, not to exceed, however, one-half of the fund which may come into their hands,

(Signed) BERNICE P. BISHOP.

in the purchase of suitable premises, the erection of School buildings, and in furnishing the same with the necessary and appropriate fixtures, furniture and apparatus. I direct my ~~executors~~ trustees to invest the —"— remainder of my estate in such —"— manner as they may think best, and to expend the annual income in the maintenance of said schools; meaning thereby the salaries of teachers; the repairing —"— buildings and other incidental expenses; and to devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the prefer-

ence to Hawaiians of pure or part aboriginal blood; the proportion in which said annual income is to be divided among the various objects above mentioned to be determined solely by my said trustees they to have full discretion. I [56] desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction
—in— (Signed) BERNICE P. BISHOP.
in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects. For the purposes aforesaid I grant unto my said trustees full power to lease or sell any portion of my real estate, and to reinvest the proceeds and the balance of my estate in real estate, or in such other manner as to my said trustees may seem best. I also give unto my said trustees full power to make all such rules and regulations as they may deem necessary for the government of said Schools and to regulate the admission of pupils, and the same to alter, amend and publish upon a vote of a majority of said trustees.

I also direct that my said trustees shall annually make a full and complete report of all receipts and expenditures, and of the condition of said Schools
(Signed) BERNICE P. BISHOP.
to the Chief Justice of the Supreme Court, or other highest judicial officer in this country; and shall also file before him annually an inventory of the property in their hands and how invested, and to publish the same in some Newspaper published in said

Honolulu; I also direct my said trustees to keep said school buildings insured in good Companies, and in case of loss to expend the amounts recovered in replacing or repairing said buildings. I also direct that the teachers of said Schools shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular Sect of Protestants.

(Signed) BERNICE P. BISHOP. [57]

Fourteenth. I appoint my husband Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke, and William O. Smith, all of Honolulu, to be my trustees to —"— carry into effect the trusts above specified. I direct that a majority of my said trustees may act in all cases, and may convey real estate, and perform all of the duties and powers hereby conferred; but three of them at least must join in all acts. I further direct that the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion.

Fifteenth. In addition to the above devise to Queen Emma, I also give, devise and bequeath to her, said Emma Kaleleonalani Queen Dowager, the Fish-pond in Kawaa, Honolulu near Oahu Prison, called "Kawa," for and during the term of her natural life; and after her decease to my trustees upon the trusts aforesaid.

Sixteenth. In addition to the above devise to my husband, I also give and bequeath to him, said

Charles R. Bishop all of my personal property of every description, including cattle at Molokai; to have and to hold to him, his executors, administrators and assigns forever.

(Signed) BERNICE P. BISHOP.

Seventeenth. I hereby nominate and appoint my husband Charles R. Bishop and Samuel M. Damon, executors of this my will.

In witness whereof I, said Bernice Pauahi Bishop, have hereunto set my hand and seal this thirty-first day of October A. D. Eighteen hundred and eighty-three.

(Signed) BERNICE P. BISHOP. (Seal)

The foregoing instrument, written on eleven pages, was signed, sealed [58] published and declared by said Bernice Pauahi Bishop, as and for her last will and testament in our presence, who at her request, in her presence, and in the presence of each other, have hereunto set our names as witnesses thereto, this 31st day of October A. D. 1883.

(Seal) (Signed) F. W. MacFARLANE.

(Signed) FRANCIS M. HATCH. [59]

Certificate of Proof of First Codicil to Will.

Supreme Court of the Hawaiian Islands.

IN PROBATE.

I, LAWRENCE M'CULLY, Justice of the said Supreme Court, do hereby certify:

That on the 2d day of December, A. D. 1884, the annexed instrument was admitted to probate as a Codicil to the Last Will and Testament of Bernice Pauahi Bishop deceased; and from the proofs taken

and the examination had therein, the Court finds as follows:

That said Bernice Pauhai Bishop died on or about the 16th day of October, A. D. 1884, that at the time of her death she was a resident of Honolulu, Oahu, that the said annexed Codicil was duly executed by the said decedent in her life-time in said Honolulu in the presence of William W. Hall and Francis M. Hatch the subscribing witnesses thereto; also, that she acknowledged the execution of the same in their presence and declared the same to be a Codicil to her Last Will and Testament, and the said witnesses attested the same at her request and in her presence; that the said decedent, at the time of executing said Codicil as aforesaid, was of full age, of sound and disposing mind, not under restraint, undue influence or fraudulent misrepresentations, nor in any respect incompetent to devise and bequeath her Estate.

IN WITNESS WHEREOF, I have signed this Certificate and caused the same to be attested by the Clerk of this court, under the seal thereof, this 2d day of December, A. D. 1884.

(Supreme Court Seal)

(Signed) L. M'CULLY,
Justice of the Supreme Court.

Attest: (Signed) Henry Smith,
Deputy Clerk. [60]

[Endorsed]: Supreme Court—In Probate. In the Matter of the Will of Bernice P. Bishop, Deceased. Certificate of Proof of Codicil. Issued the

2d day of December, A. D. 1884. (S.) Henry Smith, Dep. Clerk. [61]

First Codicil to Will of Mrs. Bernice Pauahi Bishop, Deceased.

This is a Codicil to the last Will and Testament of me, Bernice P. Bishop, dated October thirty-first A. D. Eighteen hundred and eighty-three:

1st. I give and bequeath unto Mrs. William F. Allen the sum of One Thousand Dollars ($1000.) in place of the amount given to her in my said will.

2d. I revoke the devise to Her Majesty Emma Kaleleonalani of the premises situated upon Emma Street in Honolulu, known as "Kaakohua," contained in the tenth article of my said will; and in place thereof I give, devise and bequeath unto her, said Emma Kaleleonalani, all of those parcels of land situated in Nuuanu Valley, Oahu, on both sides of the road, known as "Laimi"; to hold for and during the term of her natural life; and upon her decease to my trustees upon the trusts expressed in my said will. Said Emma to also have the fish pond known as "Kawa" as provided in the fifteenth article of my said will.

3d. In addition to the bequests to my husband named in my said will I also—

(Signed) BERNICE P. BISHOP.

also give, devise and bequeath unto my said husband, Charles R. Bishop, the land known as Waialae-nui, as well as Waialae-iki, and also the land known as "Maunalua," Island of Oahu; and also all of the premises situated in said Honolulu, known as the Ili of "Kaakopua," extending from Emma

to Fort Street and also all Kuleanas in the same, and every thing appurtenant to said premises, to hold for his life; remainder to my trustees.

4th. I give, devise and bequeath unto Kuaiwa (k) and Kaakaole (w), old retainers of my parents, that piece of land now occupied by them, situated in upper Kapalama, in said Honolulu, called "Wailuaakio"; to have and to hold for and during the term of their natural lives and that of the survivor of them; remainder to **[62]** my trustees upon the trusts named in my said will.

5th. I give, devise and bequeath unto Kaluna (k) and Hoopii, his wife, those premises now occupied and cultivated by them in Kauluwela, Liliha Street, Honolulu; to have and to hold for and during the terms of their natural lives and that of the survivor of them;

(Signed) BERNICE P. BISHOP,

remainder to my trustees upon the trusts named in my said will.

6th. I give, devise and bequeath unto Naiapaakai (k) and Loika Kahua his wife, that lot of land now enclosed and occupied by them, in Kauluwela in said Honolulu, the size of said lot not to exceed one acre; to have and to hold for and during the term of their natural lives, and that of the survivor of them; remainder to my trustees upon the trusts named in my said will.

7th. I give and bequeath unto Lola Kahailiopua Bush, of said Honolulu, the sum of Three hundred Dollars ($300.) per year during her minority, to be

applied towards her education and clothing; and upon her becoming of age the sum of One thousand Dollars ($1000.) to her sole and separate use, free from the control of any husband she may marry.

8th. I give and bequeath unto Bernice B. Barnard, of said Honolulu the sum of Three hundred Dollars ($300.) a year during her minority, to be applied towards her education and clothing—

(Signed) BERNICE P. BISHOP,

clothing; and upon her becoming of age the sum of One thousand Dollars ($1000.) to her sole and separate use, free from the control of any husband she may marry. This in lieu of the $200. given by my will.

9th. I give, devise and bequeath unto my friend Samuel M. Damon, of said Honolulu, all of that tract of land known as the **[63]** Ahupuaa of Moanalua, situated in the District of Honolulu, Island of Oahu; and also the fishery of Kaliawa; to have and to hold with the appurtenances to him, his heirs and assigns forever.

10th. I give and bequeath unto my servants Kaleleku (k) and Kaoliko (k) his brother, each the sum of Twenty Dollars ($20.) per month ~~each,~~ during the term of the natural life of each of them.

11th. I revoke so much of the fifth article of my said will as devises the land known as "Mauna Kamala" to Kahakuakoi (w) and Kealohapauole her husband; and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all

(Signed) BERNICE P. BISHOP.

all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will.

12th. I give and bequeath unto the Bishop's School in Honolulu, called "Iolani College," the sum of Two thousand Dollars ($2000.); and to the English Sisters' School called "St. Albans Priory" the sum of Two thousand Dollars ($2000.); and to "St. Andrews Church" in Honolulu, the sum of Two thousand Dollars ($2000.)

13th. I give, devise and bequeath unto Kaiulani Cleghorn, daughter of A. S. Cleghorn, of Honolulu all of that parcel of land and spring situated at Waikiki-uka, Oahu, known as Kanewai; to have and to hold for and during the term of her natural life; remainder to my trustees upon the trusts named in my said will.

14th. I give and bequeath unto the Rev. Henry H. Parker, of Honolulu, the sum of Five hundred Dollars ($500.) **[64]**

15th. I give and bequeath unto Mary B. Collins—

(Signed) BERNICE P. BISHOP,

Collins, if she be with me at the time of my death, the sum of Two hundred Dollars ($200.); and unto Maggie Wynn, if she be then with me, the sum of One hundred Dollars ($100.)

16th. I hereby give the power to all of the beneficiaries named in my said will, and in this codicil, to whom I have given a life interest in any lands, to make good and valid leases of such lands for the

term of ten years; which said leases shall hold good for the remainder of the several terms thereof after the decease of said devisees, the rent however, after such decease to be paid to my executors or trustees; provided however that no rent be collected for a longer period in advance at any time than for six months, and no bonus be taken by said devisees, or any of them, on account of such leases or lease; in either of which cases such lease or leases shall cease and determine, at the option of my executors of trustees, upon the death of such devisee or devisees, who shall have collected rent for a longer period in advance than for six months, or

(Signed) BERNICE P. BISHOP,

who shall have taken such bonus.

17th. I give unto the trustees named in my said will the most ample power to sell and dispose of any lands or other portion of my estate, and to exchange lands and otherwise dispose of the same; and to purchase land, and to take leases of land whenever they think it expedient, and generally to make such investments as they consider best; but I direct that my said trustees shall not purchase land for said schools if any lands come into their possession under my will which in their opinion may be suitable for such purpose; and I further direct that my said trustees **[65]** shall not sell any real estate, cattle, ranches, or other property, but to continue and manage the same, unless in their opinion a sale may be necessary for the establishment or maintenance of said schools, or for the best

interest of my estate. I further direct that neither my executors nor trustees shall have any control or disposition of any of my personal property; it being my will that my husband—

(Signed) BERNICE P. BISHOP.

husband, Charles R. Bishop, shall have absolutely all of my personal property of every description. And I give unto my executors named in my said will full power to sell any portion of my real estate for the purpose of paying debts or legacies without obtaining leave of Court; and to give good and valid deeds for the same, the purchasers under which are not to be responsible for the application of the purchase money.

In witness whereof I, said Bernice P. Bishop, have hereunto set my hand and seal this fourth day of October, A. D. Eighteen hundred and eighty-four. The words "to hold for his life, remainder to my trustees" interlined on 2d. page before signing.

(Signed) BERNICE P. BISHOP. (Seal)

Signed, sealed, published and declared by the said Bernice P. Bishop as and for a codicil to her last will and testament, in our presence, who at her request, in her presence and in the presence of each other, have subscribed our names as witnesses thereto.

Oct. 4, 1884.

(Signed) WILLIAM W. HALL.

(Signed) FRANCIS M. HATCH. **[66]**

[Endorsed]: 1st Codicil to the Will of Mrs. B. P. Bishop. Filed Dec. 2, 1884. (S.) Henry Smith, Dep. Clerk. **[67]**

Certificate of Proof of Second Codicil to Will.

Supreme Court of the Hawaiian Islands.

IN PROBATE.

I, LAWRENCE M'CULLY, Justice of the said Supreme Court, do hereby certify:

That on the 2d day of December, A. D. 1884, the annexed instrument was admitted to probate as a Codicil to the Last Will and Testament of Bernice Pauahi Bishop, deceased; and from the proofs taken and the examinations had therein, the Court finds as follows:

That said Bernice Pauahi Bishop died on or about the 16th day of October, A. D. 1884, that at the time of her death she was a resident of Honolulu, Oahu; that the said annexed Will was duly executed by the said decedent in her life-time in Honolulu in the presence of G. Trousseau and J. Brodie, the subscribing witnesses thereto; also, that she acknowledged the execution of the same in their presence and declared the same to be a codicil to her Last Will and Testament, and the said witnesses attested the same at her request and in her presence; that the said decedent, at the time of executing said Codicil as aforesaid, was of full age, of sound and disposing mind, not under restraint, undue influence or fraudulent misrepresentations, nor in any respect incompetent to devise and bequeath her Estate.

IN WITNESS WHEREOF, I have signed this Certificate and caused the same to be attested by the

Clerk of this Court, under the seal thereof, this 2d day of December, A. D. 1884.

(Supreme Court Seal.)

(Signed) L. M'CULLY,
Justice of the Supreme Court.

Attest: (Signed) Henry Smith,
Deputy Clerk. [68]

[Endorsed]: Supreme Court in Probate. In the Matter of the Will of Bernice P. Bishop, Deceased. Certificate of Proof of Codicil. Issued the 2d day of December, A. D. 1884. (S.) Henry Smith, Dep. Clerk. [69]

Second Codicil to Will of Bernice Pauahi Bishop, Deceased.

This is a second Codicil to the last Will and Testament of me, Bernice P. Bishop, dated October thirty-first, A. D. Eighteen hundred and eighty-three:

1st. In addition to the lands devised in the fourth article of my said will to H. R. H. Liliuokalani, the wife of John O. Dominis, I also give, devise and bequeath unto her, said Liliuokalani, all of that tract of land situated in the District of Honolulu, Island of Oahu, adjoining Waialae nui, known as "Kahala," together with the buildings thereon, and the fishing rights appurtenant thereto; to have and to hold for and during the term of her natural life, remainder to my trustees upon the trusts named in my said will.

2d. In addition to the house lot devised to Kapaa (k) in the seventh article of my said will, which

house lot was formerly the property of his wife Akahi, I also give, devise and bequeath unto him, said Kapaa (k) all of that parcel of land adjoining said house-lot, fronting on Queen Street, and extending to Richards Street, and now under lease to Henry R. Macfarlane; he—

(Signed) BERNICE P. BISHOP.

he, said Kapaa, to pay the taxes upon the same and upon the parcel devised by me to Auhea; to have and to hold for and during the term of the natural life of him said Kapaa, remainder to my trustees, upon the trusts named in my said will.

3d. I revoke the devise to Auhea (w) wife of Lokana, set forth in the eighth article of my said will. And I give, devise and bequeath unto said Auhea, that house-lot situated on *on* said Richards Street, (not on the corner of Queen Street), formerly occupied by said Auhea, and which was formerly the dwelling of Akahi; the same adjoining the premises under lease to Henry R. Macfarlane, but not included in said lease; to have and to hold for and during the term of the natural life of her, said Auhea, free from the control of [70] her husband; remainder to my trustees upon the trusts named in my said will.

4th. Of the two schools mentioned in the thirteenth article of my said will, I direct that the school for boys shall

(Signed) BERNICE P. BISHOP.

be well established and in efficient operation before any money is expended, or anything is undertaken

on account of the new school for girls. It is my desire that my trustees should do thorough work in regard to said schools as far as they go; and I authorize them to defer action in regard to the establishment of said school for girls, if in their opinion from the condition of my estate it may be expedient, until the life estates created by my said will have expired, and the lands so given shall have fallen into the general fund. I also direct that my said trustees shall have power to determine to what extent said schools shall be industrial, mechanical, or agricultural; and also to determine if tuition shall be charged in any case.

In witness whereof I, said Bernice P. Bishop, have hereunto set my hand and seal this ninth day of October, A. D. 1884.

(Signed) BERNICE P. BISHOP. (Seal)

Signed, sealed, published and declared by the said Bernice P. Bishop as and for a codicil to her last will and testament in the presence of us, who at her request, in her presence and in the presence of each other have hereunto subscribed our names as witnesses [71] thereto. October 9th, 1884.

(Signed) G. TROUSSEAU.

(Signed) J. BRODIE.

[Endorsed]: 2d Codicil to the Will of Mrs. B. P. Bishop. Filed Dec. 2, 1884. (S.) Henry Smith, Dep. Clerk. [72]

Letter, Dated June 9, 1916, Addressed to the Justices of the Supreme Court of Hawaii by the Trustees Requesting Appointment of New Trustee in Place of Samuel M. Damon.

Honolulu, T. H., June 9th, 1916.

To the Honorable A. G. M. ROBERTSON, EDWARD M. WATSON, and RALPH P. QUARLES, Justices of the Supreme Court of the Territory of Hawaii:

Sirs: The undersigned Trustees under the Will and of the Estate of Bernice Pauahi Bishop, deceased, respectfully represent to you that Samuel M. Damon, of Honolulu, one of the Trustees under the said Will and of the said Estate, has resigned his office as such Trustee, and by reason thereof there is now a vacancy in said office; that in and by the said Will it is provided that the number of Trustees thereunder and of said Estate shall be kept at five (5) and that vacancies shall be filled by the choice of a majority of the justices of the Supreme Court, the selection to be made from persons of the Protestant religion.

Wherefore, said undersigned Trustees respectfully request that your Honors appoint some person as trustee under the said Will and of the said Estate in place of and in succession to the said Samuel M. Damon, resigned as aforesaid, and suggest that William Williamson of said Honolulu, who is a person of the Protestant religion, is a suitable and proper person to be appointed such Trustee, and re-

spectfully recommend his appointment as such.

Yours respectfully,
WILLIAM O. SMITH,
E. FAXON BISHOP,
ALBERT F. JUDD, and
ALFRED W. CARTER,
Trustees under the Will and of the Estate of Bernice Pauahi Bishop, Deceased,
By HOLMES & OLSON,
Their Attorneys. [73]

Territory of Hawaii,
City and County of Honolulu,—ss.

William Williamson, being first duly sworn, upon oath deposes and says:

That he is a resident of the City and County of Honolulu, Territory of Hawaii, and that he is a person of the Protestant religion.

WILLIAM WILLIAMSON.

Subscribed and sworn to before me this 9th day of June, 1916.

[Seal] FLORENCE LEE,
Notary Public, First Judicial Circuit, Territory of Hawaii. [74]

Appointment of Trustee.

WHEREAS, Samuel M. Damon, one of the Trustees under the Will and of the Estate of Bernice Pauahi Bishop, late of Honolulu, deceased, has resigned his office as such Trustee; and

WHEREAS, by reason of such resignation a vacancy in said office now exists; and

WHEREAS, in and by the said Will it is provided that vacancies in the offices of the Trustees under said Will and of the said Estate shall be filled by a majority of the justices of the Supreme Court, the selection to be made from persons of the Protestant religion;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That the undersigned Justices of the Supreme Court of the Territory of Hawaii, being a majority of the Justices of the said Supreme Court, by virtue and in exercise of the power for this purpose given to them in and by said Will, do hereby appoint WILLIAM WILLIAMSON of the City and County of Honolulu, Territory of Hawaii, (a person of the Protestant religion), a Trustee under the said Will and of the said Estate in place of and in succession to the said Samuel M. Damon, resigned.

IN WITNESS WHEREOF the said undersigned have hereunto set their hands and seals this 9th day of June, 1916.

(Supreme Court Seal)

(Signed) A. G. M. ROBERTSON.
(Signed) E. M. WATSON.
(Signed) RALPH P. QUARLES.

[Endorsed]: Filed June 9, 1916, at 3:20 P. M. J. A. Thompson, Clerk. [75]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Proceedings Had June 9, 1916.

June 9th, 1916, 3:25 P. M.

(Petition read.)

Mr. OLSON.—Attached to this is Exhibit "A," a copy of the resolution referred to. (Reads:) This is verified by Mr. Judd, one of the trustees and one of the petitioners to the proceedings.

The COURT.—Have you the original?

Mr. OLSON.—The original which—I would like to offer that in evidence, and I will ask Mr. Judd to be sworn, because he can identify the signature.

Testimony of A. F. Judd, for Petitioner.

A. F. JUDD, a witness called on behalf of the petition, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. OLSON.)

Q. Mr. Judd, your name is Albert F. Judd, is it not? A. It is.

Q. Are you one of the petitioners in the petition for the allowance of the resignation of Samuel M. Damon as trustee, filed in the matter of the Estate of Bernice P. Bishop, deceased, in the Equity Division of this court? A. I am.

Q. Who are the present trustees of the will aside from Mr. Damon? [76]

(Testimony of A. F. Judd.)

A. William O. Smith, E. Faxon Bishop, Alfred W. Carter and myself.

Q. Yes, and Mr. Damon is the fifth trustee.

A. Mr. Damon is the fifth trustee.

Mr. OLSON.—If the Court please, for many, many years the Equity Division of the Court has had before it, in the matter of accounts, as well as the matter of previous resignations, and appointments of trustees,—and I take it that therefore there will be no necessity of offering in evidence anew,—the will of Bernice P. Bishop. It is a part of the records of this court.

The COURT.—Well, I would like to look at that will and see what provision is made in regard to the appointment of a trustee. Who has the authority?

Mr. OLSON.—Mr. Smith can hand it to you. In the meantime I shall proceed to the matter.

Q. Mr. Damon is one of the present trustees under the will? A. He is.

Q. I will show to you, Mr. Judd, a document in the form of a letter, dated Belmont, California, May 19th, 1916, purporting to be signed by one S. M. Damon, and ask you if you can identify that signature?

A. I can. That is the signature of Mr. Damon.

Q. The man referred to as one of the trustees?

A. One of the trustees.

Mr. OLSON.—I will offer that in evidence, if the Court please.

The COURT.—That is Mr. Damon's signature.

(Testimony of A. F. Judd.)

The WITNESS.—It was handed to the trustees, Mr. Olson, by Mr. Holmes— [77]

Mr. OLSON.—Yes.

A. Mr. Damon's personal attorney.

The COURT.—This document will be admitted as Exhibit "A" for the petitioners.

Mr. OLSON.—Q. Mr. Damon has been absent from the Territory, has he not, on account of his health, for some time last past?

A. He has.

Q. Considerable period of time?

A. Yes, for over a year; I think it will be two years this summer, but on that exact time I am not definite.

Q. And his return to the Territory is a matter that is indefinite, is it not? A. Yes.

Q. I will ask you whether or not it is possible for Mr. Damon, being away—by the way, where is he at the present time?

A. He is in Belmont, California.

Q. California. Is it possible for Mr. Damon properly to carry out the duties, his duties, as a Trustee of the Bishop Estate in his absence, as he is now?

A. I would like to answer that question indirectly by saying that since February of 1914 we have not had the benefit of conferences with him.

Q. He has not been able to take any personal part in the administration of the estate, has he, do you think? A. No, he has not.

(Testimony of A. F. Judd.)

Q. Are you able to state what is the attitude of the remaining trustees, under the trust, to wit, yourself and Mr. W. O. Smith, E. Faxon Bishop and Alfred W. Carter, with regard to their willingness to accede to the resignation [78] of Mr. Damon?

A. We are willing to accede to it, with a great deal of personal regret.

Mr. OLSON.—Now, if the Court please, I think your Honor has before you the provision of the will which provides for the matter of the appointment. I think that is really all that it calls for so far as—

Q. Oh, I will ask you this, Mr. Judd, will the trustees be prepared to file, if so required by the Court, an account of the Estate—of the trustees, up to the time when this resignation goes into effect, if allowed by the Court?

A. That can be done at any time on 24 hours' notice. It is our practice to keep the account up in that shape so that an account can be filed at any time.

Mr. OLSON.—I think that is all. Has the Court any questions?

The COURT.—I think not, to you as a witness, but I would like to ask both of you gentlemen—this is not a matter for the records—Yes, this is for the record. I would like to ask both of you gentlemen how you construe this—why you have presented a petition addressed to me as the Judge of this Circuit Court, having charge of the equity calendar, wherein, as I remember, you asked for the appoint-

(Testimony of A. F. Judd.)

ment of a successor to Mr. Damon—

Mr. OLSON.—No, we don't ask for the appointment of a successor.

The COURT.—What do you ask for?

Mr. OLSON.—We are asking merely that his resignation be allowed, because a resignation is not a voluntary matter [79] on the part of the trustees. The only time he voluntarily can renounce is at the beginning, when the trust is offered to him; he can then renounce or refuse to take it, but, once having assumed, he cannot voluntarily, on his own account, renounce the office and disclothe himself of the cloth of his office. It requires the approval and allowance of the Court having jurisdiction; in this case, of course, the equity court, the Judge having jurisdiction over equity matters, and in order that Mr. Damon's resignation can go into effect, and to make it possible for the final consummation of the matter of the appointment of his successor, his resignation would have to be allowed. I might say further that not only must the approval and allowance of the Court be obtained to effectuate the resignation but to effectuate his discharge from his responsibility for the acts of the trustees during the time that he has acted as trustee. The Court will necessarily require that the accounting be filed by the trustees up to the time when his resignation goes into effect by virtue of the order of the Court and his discharge from financial responsibility will only be effected when those accounts have been approved.

(Testimony of A. F. Judd.)

Argument.

The COURT.—Well, what order do you feel should be made by me at the present time?

Mr. OLSON.—My suggestion and request is, if the Court please, that the resignation of Mr. Damon be allowed—be approved, allowed and accepted, to take effect upon the appointment of his successor. Further, that the order be that the trustees of the Estate, including Mr. Damon, [80] file forthwith, upon the appointment of his successor, their accounts up to the date of the appointment of his successor, and that upon the approval and only upon the approval of those accounts Mr. Damon be discharged from his responsibility as a trustee and his bond cancelled and his sureties thereon discharged.

[81]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

June 9th, 1916, 3:30 P. M.

Mr. OLSON.—I now wish, if the Court please, to present to your Honor, in the same matter, in the Matter of the Estate of Bernice Pauahi Bishop, in the Equity Division of this court, another and separate petition addressed to your Honor. (Reads.)

A. F. JUDD, a witness called on behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. OLSON.)

Q. Mr. Judd, your name is Albert F. Judd?

(Testimony of A. F. Judd.)

A. It is.

Q. You are one of the signing petitioners to the petition for the confirmation of appointment of Mr. Williamson as one of the new trustees of the Bishop Estate, are you not? A. I am.

Q. Who are the other trustees aside from yourself and aside from Mr. Damon, who has resigned?

A. William O. Smith, E. Faxon Bishop, Alfred W. Carter.

Q. You being the fourth, and Mr. Damon having been, up [82] to this time, the fifth, up to his resignation?

Mr. OLSON.—Your Honor will take notice, I take it, of the fact that the resignation of Mr. Damon has been filed and allowed by your Honor.

Q. I will ask you, Mr. Judd, if the Supreme Justices of the Supreme Court of the Territory of Hawaii, to wit, the Honorable A. G. M. Robertson, Chief Justice, the Honorable E. M. Watson, Associate Justice, and Honorable Ralph P. Quarles, Associate Justice of the Territory of Hawaii, have named any person as the successor to Mr. Damon?

A. I have seen a document in which the three gentlemen named have signed to that effect.

Q. Nominating whom?

A. William Williamson.

Q. Mr. Williamson resides where?

A. In this city.

Q. I will ask you if you are acquainted with Mr. Williamson personally? A. I am.

Q. How long have you been acquainted with him?

(Testimony of A. F. Judd.)

A. I think since 1899.

Q. What was his occupation or profession when he first—when you first knew him?

A. I don't remember the dates, Mr. Olson. Mr. Williamson graduated from Williams College in 1895, and, whether immediately following his graduation or later, I am not now certain, he came to Oahu College, in this city, and there taught for at least two years. He taught some of my younger brothers and sisters.

Q. And after he continued as a teacher of Oahu College [83] for the period of time that you have mentioned what became his business?

A. I think it was then—he then went into the firm of Von Hamm Young & Company.

Q. In what capacity?

A. There again I cannot state with accuracy. I believe that he was a traveling salesman for some time. Whatever his connection was, his business took him to travels throughout the group.

Q. And after he terminated his connection with Von Hamm Young Company what became his business?

A. To the best of my knowledge he then went into the stock and bond business, in which he is now employed.

Q. How many years, approximately, would you say that he has been in the stock and bond business?

A. It may be five, it may be ten years; I don't know.

Q. What have you to say about the business ex-

(Testimony of A. F. Judd.)

perience and ability of Mr. Williamson?

A. He has the reputation of being a conservative business man.

Q. In your opinion would he be a suitable person to act as trustee, from a business standpoint, of the Bishop Estate? A. He would.

Q. What have you to say about Mr. Williamson from the standpoint of acting as trustee, in view of the fact that the principal purpose of the trust is the conduct of a school for boys, and a school for girls, for the benefit of children and youths of Hawaii who are principally of the Hawaiian blood?

A. At the present time I know of no other person better [84] qualified than he to take the position on the Board of Trustees.

Mr. OLSON.—I think that's all, Mr. Judd.

The COURT.—No questions.

Testimony of J. A. Thompson, for Petitioner.

Direct examination of J. A. THOMPSON, a witness called on behalf of the petitioner and first duly sworn, testified as follows:

(By Mr OLSON.)

Q. Mr. Thompson, will you sit down, please? Your name is what? A. J. A. Thompson.

Q. What is your occupation?

A. Clerk of the Supreme Court of Hawaii.

Q. I will ask you if you have brought with you pursuant to my request, a document which has been filed with you by the Justices of the Supreme Court, pertaining to the matter of the appointment of a

(Testimony of J. A. Thompson.)

trustee of the Bernice Pauahi Bishop Estate?

A. This is it.

Q. You have it with you? A. Yes, sir.

Q. I will call your attention to the third page, the first two pages consisting of, first, a communication addressed to the Justices of the Supreme Court, the second the affidavit of one William Williamson, regarding his residence and religion, and the third page, which I am now directing your attention to, being a document called appointment of trustees, and purporting to be signed by one A. G. M. Robertson, one E. M. Watson and one Ralph P. Quarles, and I will ask [85] you if you recognize those signatures and can identify them?

A. Yes, sir; they are the signatures of the persons named therein.

Q. Mr. A. G. M. Robertson is what?

A. Chief Justice.

Q. Chief Justice of the Territory of Hawaii?

A. Chief Justice of the Territory of Hawaii.

Q. Mr. E. M. Watson is Associate Justice of the Supreme Court and also Ralph P. Quarles, also an Associate Justice—

The COURT.—I think this Court may very well take judicial notice of the personnel of that court.

Mr. OLSON.—I think so.

Q. And this document altogether, consisting of these three pages, was filed with you by the Justices named?

A. Yes, sir, handed to me by the Chief Justice, ordered filed.

Mr. OLSON.—I will offer that in evidence and ask permission to file a certified copy thereof, and withdraw the original, to be kept in the files of the Supreme Court.

The COURT.—Anything further from this witness?

Mr. OLSON.—That's all.

The COURT.—No questions.

Mr. OLSON.—Upon the showing made we ask that the prayer of the petition be granted, to wit, that the appointment of William Williamson, as trustee under the will of the Estate of Bernice Pauahi Bishop, deceased, be approved and confirmed upon the filing of such a bond as your Honor may require; and in that regard I will state that it has been the practice for many years last past to require of [86] each trustee at least a bond in the sum of one hundred thousand dollars, and that the Court has in all instances, for many years last past, approved that bond given by all of the five trustees, in which each one is a principal and in which each one is a surety for every one of the other trustees. I might state that the trustees in this instance and Mr. Williamson are willing to give such a bond. Before I close I would like to ask Mr. Judd one question.

Q. (Put to Mr. Judd on the floor of the courtroom.) Is Mr. Williamson willing to undertake this office of trustee? A. He is.

I HEREBY CERTIFY the above and foregoing to be a complete and accurate extension of my short-

hand notes of the testimony taken in the above-entitled matter on the 9th day of June, A. D. 1916, before the Honorable C. W. Ashford, First Judge.

JAMES L. HORNER,
Official Reporter.

[Endorsed]: Eq. No. 2048. Reg. 2, pg. 297. Re Estate Bernice Pauahi Bishop, Deceased. Transcript of Testimony. No. 416. Filed at 11:20 o'clock A. M. September 23d, 1916. J. A. Dominis, Clerk. No. 972. Recd. and filed in the Supreme Court Sept. 25, 1916, at 12 o'clock. N. Robert Parker, Jr., Assistant Clerk. [87]

In the Supreme Court of the Territory of Hawaii.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT.

No. 972.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Suggestion of Disqualification of the Justices of the Supreme Court.

Comes now Charles E. King, the appellee, herein, and respectfully suggests that this court as present constituted is disqualified from hearing this appeal upon the ground that two of the members thereof, to wit: Chief Justice A. G. M. Robertson and Associate Justice R. P. Quarles have a pecuniary interest, direct or indirect in this cause.

Amendment allowed by the Court Jan'y 17, 1917. J. A. Thompson, Clerk.

This suggestion is based upon the record and the

attempted and pretended appointment by the justices of this court of William Williamson, as Trustee under the will and of the estate of Bernice Pauahi Bishop, Deceased, in place of and in succession to S. M. Damon, resigned.

Dated, Honolulu, T. H., December 1st, 1916.

E. C. PETERS,
By P. D. K., Jr.,
Attorney for Charles E. King.

E. C. PETERS,
Attorney and Counsellor at Law,
210–211 McCandless Bld.,
Honolulu, T. H. [88]

City and County of Honolulu,
Territory of Hawaii,—ss.

I hereby certify that on, to wit, Dec. 2, 1916, and during the ordinary business hours of said day, I left a true, full and correct copy of the foregoing Suggestion of Disqualification at the offices of Messrs. Holmes & Olson, with a person of mature age and discretion in charge of said offices.

P. D. KELLETT, Jr.

[Endorsed]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Suggestion of Disqualification. Recd. and filed in the Supreme Court, Dec. 2, 1916, at 9:40 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [89]

In the Supreme Court of the Territory of Hawaii.
October Term, 1916.

No. 972.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Opinion of Supreme Court of Hawaii.

HON. C. W. ASHFORD, Judge.

Argued January 24, 1917.

Decided February 1, 1917.

ROBERTSON, C. J., QUARLES AND COKE, JJ.

Judges—Disqualification—Pecuniary Benefit.

Where a majority of the justices of the supreme court acting under a power of appointment contained in a will, the justices receiving no reward or pecuniary benefit, fill a vacancy among the trustees under such will, they are not thereby disqualified from sitting in a case on appeal involving the validity of the appointment.

Wills—Construction—Appointment of Trustees.

The will of B named five trustees to execute a certain trust therein created, provided that the number of trustees should be kept at five, and provided that vacancies among the trustees should be "filled by the choice of a majority of the justices of the supreme court;" at the time the will took effect the justices, severally,

exercised original jurisdiction in equity subject to appeal to the Supreme Court in banco; later all original jurisdiction in equity was transferred to circuit judges sitting at chambers in equity. Held, in construing the will, that it was the intention of the testatrix to vest the power of filing vacancies in the justices, as individuals, and not in the court which should exercise original jurisdiction in matters of the trust, and, consequently, [90] that the transfer of sole original jurisdiction to circuit judges at chambers in equity did not transfer from the justices of the supreme court to the circuit judge the power of filling vacancies among the trustees under the will.

Same—Same—Words and Phrases.

Where an instrument creating a trust named trustees, fixed the number of trustees and provided that vacancies among the trustees "should be filled by the choice of the majority of the justices of the Supreme Court," the word "choice" therein is synonymous with and means "appoint," and an appointment so made is not subject to confirmation or rejection by the circuit judge exercising original jurisdiction in matters relating to the trust.

Trusts—Appointment of Trustee—Judicial Function.

While a grantor of a trust cannot delegate a judicial function to any court, such function being created by law, the naked power of appointing

in succession the trustees of a trust is not a judicial function but a power which may be delegated by the grantor. [91]

OPINION OF THE COURT BY QUARLES, J.

In the will of Bernice P. Bishop, after making a number of devises and bequests, the testatrix devised the residue of her estate to five trustees therein appointed, to be held and used by them in the erection and maintenance in the Hawaiian Islands of two schools, one for boys and one for girls, to be called the Kamehameha Schools, a portion of the income for each year to be devoted to the support and education of orphans and others in indigent circumstances, giving the preference to Hawaiian of pure and part aboriginal blood. The estate is very large and of great value. Considerable discretion is left to the trustees in the execution of the trust and the furtherance of its objects. The testatrix named as such trustees, her husband, Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke and William O. Smith, and under the paragraph naming them (14) are found the following provisions: "I direct that a majority of my said trustees may act in all cases, and may convey real estate, and perform all of the duties and powers hereby conferred; but three of them at least must join in all acts. I further direct that the number of my trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the trustees of the Supreme Court, the selection to be made from persons of the protestant

religion." This will was executed in 1883, the year before the testatrix died, and the will was admitted to probate December 2, 1884. Vacancies have occurred from time to time and have been filled so that on the 9th day of June, 1916, of the five trustees, namely, Samuel M. Damon, William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, only the first two mentioned were appointed by the testatrix. On June 9, 1916, the written resignation of Samuel M. Damon as such trustee was presented to the first judge of the first Judicial Circuit, who at chambers exercises [92] original jurisdiction in equity, and has original jurisdiction of the trust created by said will, and on the petition of all of said trustees was by order then made accepted, thereby leaving a vacancy caused by the said resignation of said Samuel M. Damon. On the same day the said vacancy was brought to the attention of the justices of this court by presenting said resignation, and all of the justices, exercising the power delegated to them in the said will, appointed William Williamson to succeed the said Samuel M. Damon as trustee under the provisions of said will. Thereupon and on the same day the trustees Smith, Bishop, Judd and Carter presented the said Circuit Judge their petition setting forth the qualifications of said Williamson as such trustee and his said appointment by the justices of this court and prayed that his appointment as aforesaid be confirmed by said Circuit Judge. A hearing on the said petition was immediately had when certain evidence touching the qualifications

and fitness of the said William Williamson as such trustee was introduced before the said Circuit Judge. Thereafter, and on the 29th day of July, 1916, the said Circuit Judge in a document styled "Opinion and Decision" decided that the appointment of the said Williamson as aforesaid was without authority, null and void; made an order assuming to appoint Charles E. King as trustee to fill the said vacancy, and fixed his bond at $20,000 if given separately, but providing, however, that a new joint bond on behalf of all of the trustees, including the said King, might be given in the sum of $100,000. Thereafter, and on August 3, 1916, a decree was filed, signed by the said Circuit Judge, adjudging the appointment of William Williamson as such trustee by the justices of this court to be null and void; appointing the said Charles E. King as a trustee under the said will in succession to Samuel M. Damon resigned, and providing for the execution in the [93] alternative of one of the bonds before mentioned. From the said decree of the Circuit Judge the trustees have appealed to this court.

A written suggestion of the disqualifications of the justices of this court who made the said appointment of William Williamson as such trustee was filed in this court on the 2d day of December, 1916, wherein it is suggested that the said justices "have a pecuniary interest, direct or indirect, in this cause." The power of appointment delegated to a majority of the justices of this court in and by the said provision of the will aforesaid is a naked power without reward or pecuniary benefit to the

justices or any of them. For this reason the suggestion as to the disqualification of the justices appointing the said William Williamson to fill the said vacancy was denied; and it was held, and is held, that the said justices are not disqualified from presiding at the hearing and determination of this appeal.

The ground upon which the learned Circuit Judge based his decision that the appointment of William Williamson by the justices of this court was without authority and void is that at the time of the death of the testatrix and prior thereto the Supreme Court of Hawaii and the justices thereof exercised original jurisdiction in equity, and by the rules of law and equity the court and the justices thereof were vested with the power to fill vacancies in the matter of trustees generally; that it was the intent of the testatrix to vest such power in the court and not in the individuals who might from time to time "chance to fill the offices of a majority of the justices of the Supreme Court," and this view has been ably and learnedly insisted upon by counsel for Charles E. King. The fitness of the trustee appointed is not a matter for the Circuit Judge to determine, but the power and responsibility of so doing are vested by the testatrix in the justices [94] of this court, a majority of whom must exercise such duty. It is not contended that the testatrix did not have the power of appointing the original trustees, or that she did not have the power, for the purpose of perpetuating the trust and carrying out the objects and purposes thereof, of pro-

viding in her will the mode and manner of filling vacancies among the trustees under the will, or that she did not have the power of prescribing what individuals, body or tribunal should exercise such power, the contention being that she intended that the judicial tribunal exercising control over the matters of the trust should exercise the power of filling vacancies, and that when, by the judiciary act of 1892, exclusive original jurisdiction in equity was vested in circuit judges sitting at chambers, the said power passed from the Supreme Court and justices thereof to the Circuit Judges and can only be exercised, under a proper construction of paragraph 14 of said will, by the Circuit Judge who, presiding at chambers in equity, has jurisdiction in equity. To support this contention cases in which it is claimed that the justices of the Supreme Court sitting in banco exercised original jurisdiction are cited as follows; Tucker v. Est, of Metcalf, 3 Haw. 180; Davis v. Brewer, 3 Haw. 359; Wei See v. Young Sheong, 3 Haw. 489; In the Matter of the Estate of His Late Majesty Lunalilo, 3 Haw. 519; Unauna v. Armstrong, 3 Haw. 705; Kalakaua v. Keaweamahi, 4 Haw. 577, and Kalaeokekoi v. Kahele, 4 Haw. 668.

In Tucker v. Est. of Metcalf, Chief Justice Allen, as chancellor, and Hartwell, Justice, sat in an equity case and made an order referring the cause to a master to state an account in the matter of the dissolution of a partnership "with the agreement that Hartwell, J., should sit with the chancellor, and their decision be final." In Davis v. Brewer, Wei See v. Young Sheong (see concurring opinion of Hartwell,

J.), In the Matter of the Estate of His Late Majesty Lunalilo, Unauna v. Armstrong, and [95] Kalaeokekoi v. Kahele, the hearings in the Supreme Court were upon appeal as a careful inspection of the decisions will show, except in the case last mentioned, but the record in this court shows that in that case a demurrer was heard by Judd, C. J., as chancellor, and sustained by him March 23, 1883, an appeal being taken from his decision on March 24, 1883. The decision under this appeal, which is reported in 4 Haw. 668, was filed April 11, 1883. By constitutional and statutory provisions prior to the judiciary act of 1892 original jurisdiction in equity was vested in the Supreme Court and Circuit Courts. Such jurisdiction was exercised by the chief justice as chancellor, the first associate justice as vice-chancellor, and, subsequent to 1862, by the second associate justice, acting severally and not jointly, and from the decision of the chancellor, vice-chancellor or second associate justice an appeal lay to the Supreme Court in banco (Constitution 1852, Art. 86; Constitution 1864, Art. 68; Compiled Laws 1884, Secs. 847, 848). After the act of 1878 (see Compiled Laws 1884, p. 389), and prior to the judiciary act of 1892, the several justices of the Supreme Court sitting at chambers, and the several Circuit Judges, exercised original equity jurisdiction. A careful examination of the decisions shows that it was the rule by constitution, statute and practice for a single justice to sit in equity matters, his decision being subject to appeal to the Supreme Court *in banco*. To this rule, custom or practice there appears to

have been only two exceptions, those in the cases of Tucker v. Est. of Metcalf, and Kalakaua v. Keaweamahi, where, by agreement, the first named cause was submitted to the chancellor and Hartwell, Jr., and in the latter cause a demurrer was heard in the first instance by the full court, by consent, for the purpose of expediting the decree in the cause and making the decision on the demurrer final, analogous to reserving a question. The very fact that in these two last cases named the submission to more than one [96] justice was by consent tends to show the departure made in these cases from the usual practice in equity matters wherein original jurisdiction in equity was exercised by a single justice sitting in equity at chambers. This practice obtained at the time the will of the testatrix was written, had obtained for many years prior thereto, and was in force at the time the will was probated and took effect; hence the provision of the will under consideration must be construed as being intended to vest and as vesting in the justices of this court as individuals, and not as a court, the power of filling vacancies among the trustees. If the authority to fill such vacancies had been delegated to the police magistrate of Honolulu it would be evident that it was not in the mind of the testatrix that the particular Judge or court exercising equity jurisdiction in other matters touching the trust should also have power to fill vacancies in the office of trustee under the will. Inasmuch as the justices of the Supreme Court at the time the will became effective did not act jointly

or as a court *in banco* in exercising original jurisdiction, but acted severally, it would be extending the terms of the provision of the will under consideration to hold that the testatrix intended by the language used that when a trustee under the will dies or resigns the vacancy thereby occasioned should be filled by appointment made by the particular court exercising original equity jurisdiction in other matters pertaining to the trust. It is true that the testatrix in the will could not delegate a judicial function to any court; that such functions are created by law and not by appointment of individuals. But the naked power of appointing in succession the trustees of the trust is not of itself a judicial function but a power which may be created by the grantor of a trust. If the testatrix had named the chancellor as the person to fill vacancies it might well be contended that she intended [97] that the Court exercising original equity jurisdiction should fill vacancies among the trustees under her will, and, consequently, that when the Chief Justice ceased to be chancellor and the powers of the chancellor were transferred to the Circuit Judge sitting at chambers in equity, that it was her intention that the latter should thereafter exercise such power of appointment. We think the conclusion is reasonable that the testatrix in naming a majority of the justices of this court intended that the individuals occupying the offices of chief justice and associate justices, or a majority of them, acting as individuals, should exercise the power of appointment, and not the Supreme Court, and that the language used is merely descrip-

tive of the persons whom she intended should exercise the power. This conclusion is the more reasonable one when we reflect that the testatrix must have known of the changes which occur from time to time in the personnel of the justices of this court.

Construing the provision in the will of the testatrix touching the filling of vacancies among the trustees under the will as we do make it unnecessary to review the many authorities to which we have been cited to the effect that when the judge of a certain court charged with the sole exercise of original jurisdiction of a particular subject, for instance, equity or probate, is vested with the power of filling vacancies among the trustees of a trust by the instrument creating the trust, that the grantor intended to vest the *court* with such power and not the *judge as an individual* who presides over such court, such authorities not being in point here. The delay and confusion that have arisen in the matter before us are largely due to the improper action of the trustees under the will of the testatrix in petitioning the first Circuit Judge, sitting at chambers in equity, to confirm the appointment of William Williamson as trustee. The will does not provide that the choice or appointment made by the justices [98] of this court should be subject to the approval or consent of any other officer or tribunal. The power of approval implies the power or right of disapproval—the power of vetoing the act of the justices of this court in exercising the power of appointment—and such veto power, if exercised as attempted by the learned

Circuit Judge, would necessarily result in defeating the intent of the testatrix as expressed in the provisions of her will under consideration. The only proper petition to the Circuit Judge would be one asking that he name the amount of the bond to be given by the appointee and approve the same when given.

The learned Circuit Judge took the view that the word "choice" in the provision of the will of the testatrix under consideration is synonymous with and means "nominate," and does not mean "appoint," and he therefore concludes that the power of approving or rejecting a "nomination" made by the justice or a majority of the Justices of this court rests with him. With this view counsel for Charles E. King does not concur, as in the argument on the appeal he expressed the view that the word "choice" is synonymous with and means "appoint," and with such view we fully agree.

The decree appealed from is reversed and the cause is remanded to the Circuit Judge sitting at chambers in equity with instructions to dismiss the petition asking for the approval of the appointment of William Williamson in succession to Samuel M. Damon resigned, and for such further proceedings as are consistent with the views herein expressed.

P. R. BARTLETT (HOLMES & OLSON, with him on the brief), for the Trustees.

E. C. PETERS, for Charles E. King.

A. G. M. ROBERTSON.

RALPH P. QUARLES.

JAMES L. COKE.

[Endorsed]: No. 972. Supreme Court, Territory of Hawaii. October Term, 1916. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Opinion. Filed February 1, 1917, at 3:15 o'clock P. M. J. A. Thompson, Clerk. [99]

In the Supreme Court of the Territory of Hawaii.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.—No. 972.

In the Matter of the Estate of BERNICE P. BISHOP, Deceased.

Decision on Appeal.

In the above-entitled cause, pursuant to the opinion of the above-entitled court filed on the first day of February, 1917, the decree appealed from is reversed, and the cause is remanded to the Circuit Judge sitting at Chambers in Equity, with instructions to dismiss the petition asking for the approval of the appointment of William Williamson in succession to S. M. Damon, resigned, and for such further proceedings as are consistent with the views in said opinion expressed.

Dated Honolulu, T. H., this 13th day of February, 1917.

By the Court:
J. A. THOMPSON,
Clerk, Supreme Court, Territory of Hawaii.

[Endorsed]: No. 972. Supreme Court, Territory of Hawaii. October Term 1916. In the Matter of the Estate of Bernice P. Bishop, Deceased. Deci-

sion on Appeal. Filed February 13, 1917, at 1:45 P. M. J. A. Thompson, Clerk. [100]

In the Supreme Court of the Territory of Hawaii.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

#972.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Motion for Entry of Decree.

Comes now Chas. E. King, the appellee in the above-entitled motion, and respectfully moves that a Decree on Appeal be entered and filed herein, and respectfully tenders herewith a form of decree on appeal for that purpose.

This motion was based upon the record of proceedings had herein and the form of decree submitted herewith.

Dated at Honolulu, T. H., this 14th day of April, A. D. 1917.

E. C. PETERS,
Attorney for Chas. E. King. [101]

In the Supreme Court of the Territory of Hawaii.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

#972.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Decree on Appeal.

This cause coming on for hearing in this court, and the Court having considered the same and heard the argument of the respective counsel, and having heretofore, to wit, on February 1st, 1917, rendered a written opinion herein, and a decision upon the same having been filed in accordance therewith, on, to wit, February 13th, 1917,—

IT IS ORDERED, ADJUDGED AND DECREED: That pursuant to said written opinion and said decision, the decree and judgment of the Circuit Judge appealed from, is reversed, and the cause is remanded to said Circuit Judge aforesaid, sitting at Chambers in Equity, with instructions to dismiss the petition asking for the approval of the appointment of William Williamson in succession to S. M. Damon, resigned, as Trustee under the will of Bernice P. Bishop, and for such further proceedings as are consistent with the views expressed in said opinion and decree aforesaid.

Dated, Honolulu, T. H., April ——, 1917.

By the Court:

_____,

Clerk, Supreme Court, Territory of Hawaii.

Approved:

_____,

Chief Justice. [102]

City and County of Honolulu,
Territory of Hawaii,—ss.

I hereby certify that on, to wit, ————, I did deposit a full, true and correct copy of the foregoing

——— in the United States Post Office at Honolulu, City and County of Honolulu, Territory of Hawaii, inclosed in an envelope duly postpaid and addressed to ——— at Honolulu aforesaid, in time to reach such address in due course of mail, to wit:

YONG SEN.

[Endorsement]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Motion for Entry of Decree on Appeal. Filed April 16, 1917, at 9:40 A. M. J. A. Thompson, Clerk. [103]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CLERK'S MINUTES.

Vol. 5. Monday, April 16, 1917.

Page 265.

Court convened at 10:00 o'clock A. M.

Present on the Bench,

Hon. A. G. M. ROBERTSON, C. J., Hon. R. P. QUARLES and Hon. J. L. COKE, JJ.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

S. C. No. 972.

From Page 207.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Minutes of Court—April 16, 1917—Hearing Upon Motion of Charles E. King for Entry of Decree.

Appearances:

E. C. PETERS, and F. SCHNACK, for the Motion.

C. H. OLSON, of the Firm of HOLMES & OLSON, and P. R. BARTLETT, Contra.

When the above-entitled cause was called, Mr. Schnack stated to the Court that a motion for the entry of a decree in said cause has been filed, and thereupon Mr. Olson objected to the entry of the decree at this time.

At the request of the Court, Mr. Schnack proceeded to read the motion for the entry of the decree; he also read a form of a decree tendered with said motion.

The Court rendered its ruling denying the motion, on the ground that the case has already been remanded to the lower court upon the decision heretofore filed following the practice of the [104] Court wherein notice is given the lower court. [105]

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT COURT, FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Petition on Appeal.

The petitioner herein, Charles E. King, deeming himself aggrieved by the decree entered February 13th, 1917, in the Supreme Court of the Territory of Hawaii, in the above-entitled matter and proceeding, does hereby appeal from the same to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that this appeal to the said United States Circuit Court of Appeals for the Ninth Circuit may be allowed in accordance with the laws of the United States in that behalf made and provided, and for the reasons specified in the assignment of errors herein; and that a transcript of the record, proceedings and documentary exhibits upon which said decree was made, duly authenticated, may be sent to said United States Circuit Court of Appeals for the Ninth Circuit; and, also, that an order may be made by this Honorable Court fixing the amount of the bond which the said Charles E. King shall give and furnish upon said appeal, and that upon the filing of such bond all proceedings in said above-entitled cause in the Supreme Court of the Territory of Hawaii and in the Circuit Court of the First Judicial Circuit of said Territory, be suspended and stayed, until the determination of this appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

And in this behalf, your petitioner Charles E. King, [106] shows that said decree was rendered in equity and that the amount involved, exclusive of

costs, exceeds the sum of $5,000.00.

Dated this 27th day of April, A. D. 1917.

CHARLES E. KING,
Petitioner.

E. C. PETERS,
By F. SCHNACK,
Attorney for Petitioner.

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

Charles E. King, being first duly sworn, on oath deposes and says:

That he is the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof, and that the matters and things therein set forth are true of his own knowledge; and, further, that the amount involved in said cause, exclusive of costs, exceeds the sum of $5,000.00.

CHARLES E. KING.

Subscribed and sworn to before me this 27th day of April, A. D. 1917.

[Notarial Seal] F. SCHNACK,
Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsement]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Petition on Appeal. Filed April 27, 1917, at 3:05 P. M. J. A. Thompson, Clerk. E. C. Peters, Esq., Attorney for Appellant. [107]

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT COURT, FIRST CIRCUIT.

In the Matter of the Estate of BERNICE P. BISHOP, Deceased.

Assignment of Errors.

Comes now Charles E. King, appellant herein, and says that in the record, opinion and decision, decree and proceedings in the above-entitled matter, in the above-entitled court, there is manifest and material error, and appellant herein now makes, files and presents the following assignment of errors upon which he relies, as follows, to wit:

I.

That the Court erred in holding and deciding that, as constituted, it was not disqualified from sitting upon the appeal herein.

II.

That the Court erred in not holding and deciding that the Honorable the Associate Justice RALPH P. QUARRELS, and the Honorable the Chief Justice A. G. M. ROBERTSON, were, and each of them was, pecuniarily interested in the issue of this case, and under the provisions of Section 84 of the Organic Act were, and each of them was, disqualified from sitting as members of the Supreme Court upon appeal herein.

III.

That the Court erred in holding and deciding that

under the fourteenth article of the will of Bernice Pauahi Bishop, deceased, the power of filling vacancies among the trustees under [108] the will and of the estate of said decedent was reposed in a majority of the justices of the Supreme Court acting as individuals.

IV.

That the Court erred in not holding and deciding that under the fourteenth article of the will of Bernice Pauahi Bishop, deceased, as the law at the time of the death of the testatrix then existed, the power of filling vacancies among the trustees under the will of the estate of said decedent was reposed in the Supreme Court.

V.

That the Court erred in not holding and deciding that under the fourteenth article of the will of Bernice Pauahi Bishop, deceased, as the law at the time of the death of the testatrix then existed, the power of filling vacancies among the trustees under the will and of the estate of said decedent was reposed in the Supreme Court of the Territory of Hawaii, and that on passage of the Judiciary Act of 1892 (Chapter 57, S. L. 1892), as amended, this power was reposed in the Circuit Courts at Chambers, and at the time of filling the vacancy caused by the resignation of one of the trustees, S. M. Damon, Esq., reposed in the Circuit Court of the First Circuit at Chambers.

VI.

That the Court erred in not holding and deciding that at best, in the absence of an absolute delegation

of the power of appointment upon the Court as such, a majority of the Justices of the Supreme Court had merely the power of nomination, and that the power of appointment under the fourteenth article of the will of Bernice Pauahi Bishop, deceased to the office of trustee under the will and of the estate of said decedent, was [109] at the time of the filling of the vacancy herein in succession to S. M. Damon, Esq., resigned, vested in the Circuit Court of the First Circuit at Chambers.

VII.

That the Court erred in holding and deciding that the decree of the Circuit Judge appealed from, be reversed, and the cause remanded to said Circuit Judge sitting at Chambers in Equity, with instructions to dismiss the petition asking for the approval of the appointment of William Williamson in succession to S. M. Damon, Esq., resigned, as trustee under the will of Bernice P. Bishop, deceased, and for such further proceedings as were consistent with the views expressed in the opinion and decree of said Court.

VIII.

That the Court erred in entering its decree herein dated February 13th, 1917, ordering, adjudging and decreeing that the decree of the Circuit Judge appealed from be reversed, and the cause remanded to said Circuit Judge sitting at Chambers in Equity, with instructions to dismiss the petition asking for the approval of the appointment of William Williamson in succession to S. M. Damon, Esq., resigned,

as trustee under the will of Bernice P. Bishop, deceased, and for such further proceedings as were consistent with the views expressed in the opinion of said Court.

IX.

That the Court erred in not affirming the decree of the Circuit Judge appealed from.

WHEREFORE, and in order that the foregoing Assignment of Errors may be and appear of record, the said appellant herein [110] files and presents the same to the said court and prays that such disposition may be made thereof as may be in accordance with law. And said appellant herein prays a reversal of the above-mentioned decree heretofore made and entered by said Court and appealed from.

CHARLES E. KING, Appellant.
By E. C. PETERS,
By F. SCHNACK,
His Attorney.

Service of the foregoing Assignment of Errors is hereby admitted this 27th day of April, A. D. 1917.

HOLMES & OLSON,
Attorneys for A. F. Judd, E. Faxon Bishop, W. O. Smith, and Alfred W. Carter, Trustees Under the Will and of the Estate of Bernice P. Bishop, Deceased. [111]

[Endorsed]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Assignment of Errors. Filed April 27, 1917, at 3:05 P. M. J. A. Thompson, Clerk. [112]

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT COURT, FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Supersedeas and Cost Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Charles E. King, of Honolulu, City and County of Honolulu, Territory of Hawaii, as principal, and Edmund Stiles, of the same place, as surety, are held and firmly bound unto William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, as trustees under the will and of the estate of Bernice Pauahi Bishop, deceased, in the full and just sum of FIVE HUNDRED ($500.00) DOLLARS, for the payment of which, well and truly to be made, we do hereby bind ourselves, our and each of our respective heirs, executors and administrators, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS AS FOLLOWS:

WHEREAS, in the above-entitled cause and court, an appeal from the decree heretofore therein rendered has been taken and allowed to the United States Circuit Court of Appeals for the Ninth Circuit, and a supersedeas issued therein:

NOW, THEREFORE, shall the above bounden principal prosecute his said appeal to effect and conclusion, and answer all damages and costs if he

fails to make good his plea, then the above obligation shall be null and void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the above named principal and surety **[113]** have hereunto set their hands and seals, this 27th day of April, A. D. 1917.

CHARLES E. KING, (Seal)
Principal.
EDMUND STILES, (Seal)
Surety.

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

Edmund Styles, being first duly sworn, on oath deposes and says: That he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii, and is worth double the amount of the penalty in the foregoing bond in property located in said Honolulu aforesaid, not exempt from execution, over and above all debts and liabilities.

EDMUND STILES.

Subscribed and sworn to before me this 27th day of April, A. D. 1917.

[Notarial Seal] F. SCHNACK,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Approved as to form and sufficiency of surety.
[Supreme Court Seal]

A. G. M. ROBERTSON,
Chief Justice, Supreme Court of the Territory of Hawaii. **[114]**

[Endorsement]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Supersedeas and Cost Bond on Appeal. Filed April 27, 1917, at 3:05 P. M. J. A. Thompson, Clerk. E. C. Peters, Esq. Attorney for Appellant. **[115]**

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT COURT, FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Order Allowing Appeal and Fixing Amount of Bond.

Upon reading and filing the petition and assignment of errors presented to this court by Charles E. King, in which he prays that an appeal may be allowed him to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree of this court entered on the 13th day of February, 1917, in the above-entitled matter and proceeding, wherein it is alleged manifest error hath occurred; and in order that said error, if any there be, may be speedily corrected and justice done in the premises:

IT IS ORDERED that the said appeal to the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is, hereby allowed.

and said petitioner is ordered to file with the clerk of this court, an approval bond in the sum of $500, conditioned that he will prosecute said appeal to conclusion, and effect and answer all damages and costs if he fails to make good his said plea and appeal.

AND IT IS FURTHER ORDERED that upon the filing of such bond, all further proceedings in the above-entitled cause, in this court and in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, shall be suspended and stayed until **[116]** the determination and conclusion of the said appeal aforesaid in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 27th day of April, A. D. 1917.

[Seal] A. G. M. ROBERTSON,
Chief Justice, Supreme Court of the Territory of Hawaii. **[117]**

[Endorsed]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Order Allowing Appeal and Fixing Amount of Bond. Filed April 27, 1917, at 3:05 P. M. J. A. Thompson, Clerk. **[118]**

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT COURT, FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Citation.

The United States of America,—ss.

The President of the United States of America:

To William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, as Trustees Under the Will and of the Estate of Bernice Pauahi Bishop, Deceased, GREETING:

You are hereby cited and admonished to be and to appear before the United States Circuit Court of Appeals for the Ninth Circuit, within thirty (30) days from the date of this citation, pursuant to an appeal filed in the office of the clerk of the Supreme Court of the Territory of Hawaii, in the above-entitled cause and matter, to show cause, if any there be, why the decree entered, docketed, filed and made in the Supreme Court of the Territory of Hawaii, on to wit, the 13th day of February, 1917, in the above-entitled matter, wherein it is alleged manifest error hath happened, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 27th day of April, A. D. 1917.

[Seal] A. G. M. ROBERTSON,

Chief Justice, Supreme Court of the Territory of Hawaii.

Service of the foregoing admitted this 27th day of April, 1917.

HOLMES & OLSON,

Attys. for Trustees, B. P. Bishop Estate. [119]

[Endorsed]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Citation. Filed and issued for service this 27th day of April, 1917, at 3:05 P. M. J. A. Thompson, Clerk. Returned April 28, 1917 at 12:15 P. M. J. A. Thompson, Clerk. [120]

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Praecipe for Transcript.

To JAMES A. THOMPSON, Esquire, Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of the record in this, the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the appeal heretofore issued by said court and include in said transcript the following pleadings, proceedings, opinions, judgments, exhibits and papers on file in said cause, to wit:

1. Copy petition for allowance of resignation of S. M. Damon as Trustee.

2. Copy resignation of S. D. Damon—Plaintiff's Exhibit "A" and affidavit of Wm. Williamson regarding his residence and religion.
3. Copy of appointment of William Williamson as trustee by justices of the Supreme Court.
4. Communication by trustees under the Will and of the Estate of B. P. Bishop, deceased, addressed to justices of the Supreme Court, asking the appointment of William Williamson in place of S. M. Damon. **[121]**
5. Copy petition for confirmation of appointment of new trustee.
6. Copy decree of Hon. C. W. Ashford, dated June 9, 1916.
7. Copy opinion and decree of Hon. C. W. Ashford, dated July 29, 1916.
8. Copy opinion and decree of Hon. C. W. Ashford, dated Aug. 3, 1916.
9. Copy notice of appeal and appeal, dated Aug. 3, 1916.
10. Copy of certificate of proof of will.
11. Copy Will of B. P. Bishop, deceased, dated Oct. 31, 1883.
12. Copy 1st codicil to will of B. P. Bishop, deceased, dated Oct. 4, 1884.
13. Copy of certificate of proof of will, dated December 2, 1884.
14. Copy second codicil to will dated Oct. 9, 1884.
15. Copy original transcript of testimony.
16. Copy suggestion of disqualification of justices of Supreme Court.

17. Copy of opinion of Supreme Court of Hawaii, dated Feb. 1, 1917.
18. Copy of decision of Supreme Court of Hawaii on appeal, dated Feb. 13, 1917.
19. Copy of decree of Supreme Court of Territory of Hawaii on appeal with minutes of clerk showing refusal to enter same.
20. Copy of assignment of errors.
21. Copy of order allowing appeal and fixing amount of bond.
22. Copy of supersedeas and cost bond on appeal.
23. Copy of citation on appeal and return of service.
24. Copy of praecipe for transcript.

Dated Honolulu, T. H., this 27th day of April, A. D. 1917.

CHARLES E. KING,
Appellant.
By E. C. PETERS,
His Attorney. **[122]**

[Endorsement]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Praecipe. E. C. Peters, Attorney for Charles E. King. Filed April 30, 1917, at 12:25 P. M. J. A. Thompson, Clerk. **[123]**

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT JUDGE,
FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Amended Praecipe for Transcript.

To JAMES A. THOMPSON, Esquire, Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of the record in this, the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the appeal heretofore issued by said court, and include in said transcript the following pleadings, proceedings, opinions, judgments, exhibits and papers on file in said cause, to wit:

1. Copy petition for allowance of resignation of S. M. Damon as trustee.
2. Copy resignation of S. M. Damon—Plaintiff's Exhibit "A" and affidavit of Wm. Williamson regarding his residence and religion.
3. Copy of appointment of William Williamson as trustee by justices of the Supreme Court.
4. Communication by trustees under the Will and of the Estate of B. P. Bishop, deceased, addressed to justices of the Supreme Court, asking the appointment of William Williamson in place of S. M. Damon. **[124]**

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13. Copy of certificate of proof of will, dated December 2, 1884.
14. Copy second codicil to will, dated Oct. 9, 1884.
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18. Copy of decision of Supreme Court of Hawaii on appeal, dated Feb. 13, 1917.
19. Copy of motion for entry of decree and form of decree with minutes of clerk showing refusal to enter same.
20. Copy petition on appeal.
21. Copy of assignment of errors.
22. Copy of order allowing appeal and fixing amount of bond.

23. Copy of supersedeas and cost bond on appeal.
24. Copy of citation on appeal and return of service.
25. Copy of praecipe for transcript.
26. Copy of amended praecipe for transcript. **[125]**

Dated at Honolulu, T. H., this 2d day of May, A. D. 1917.

CHARLES E. KING,
Appellant.
By E. C. PETERS,
By F. SCHNACK,
His Attorney.

[Endorsement]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Amended Praecipe for Transcript. Filed May 2, 1917, at 4:15 P. M. J. A. Thompson, Clerk. E. C. Peters, Attorney for Charles E. King. **[126]**

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

APPEAL FROM CIRCUIT JUDGE,
FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.

Certificate of Clerk to Transcript of Record.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the

petition on appeal herein filed a copy whereof is attached to the foregoing transcript of record, being pages 106 to 107, both inclusive, and in pursuance to the Amended Praecipe to me directed, a copy whereof is hereto attached, being pages 124 to 126, both inclusive, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 105, both inclusive, pages 113 to 115, both inclusive, and pages 121 to 123, both inclusive, AND DO HEREBY CERTIFY *that* the same to be full, true and correct copies of the pleadings, record, proceedings, minutes, opinion and decree which are on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in a cause entitled "In the Matter of the Estate of Bernice Pauahi Bishop, Deceased" (Number 972).

I DO FURTHER CERTIFY that the original Assignment of Errors, and admission of service of copy thereof by Messrs. Holmes & Olson, attorneys for the appellees, being pages 108 to 112, both inclusive, the original Order Allowing Appeal and Fixing Amount of **[127]** Bond, being pages 116 to 118, both inclusive, and the original Citation and admission of service of copy thereof by Messrs. Holmes & Olson, attorneys for the appellees, being pages 119 to 120, both inclusive, of the foregoing transcript are herewith returned.

I ALSO CERTIFY that the cost of the foregoing transcript of record is $33, and that said amount has

been paid by the appellant herein, through his attorney.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 7th day of May, A. D. 1917.

[Seal] JAMES A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii. **[128]**

[Endorsed]: No. 3000. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Charles E. King, Appellant, vs. William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, as Trustees Under the Will and of the Estate of Bernice Pauahi Bishop, Deceased, Appellees. Transcript of Record. Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filed May 16, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.